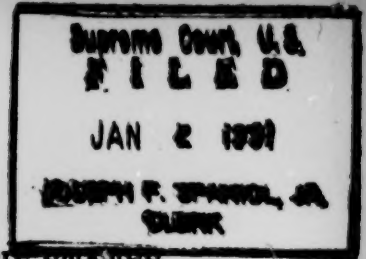


90-1050

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MICHAEL J. FRIEDMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, under Fed. R. Crim. P. 12, a defendant's claim that his federal indictment must be dismissed because it was returned by a grand jury whose members made overt, racist, "us"-against-"them" remarks during the grand jury proceedings, and whose supervising prosecutors did nothing to counter the expression of racism and may have joined in it, is waived -- and no relief from waiver is available -- where the defense counsel first learned of the racial remarks while reviewing Jencks Act material produced immediately before trial, and brought the matter to the district court's attention before the trial started, but filed the formal motion to dismiss a few days after trial had begun.

II. Whether grand jury discrimination in

the federal courthouse by black grand jurors against a white accused can be treated differently than grand jury discrimination by white grand jurors against black accuseds or whether a federal indictment is per se void, regardless of whether the discrimination is by whites against blacks or by blacks against whites, where overt racist remarks were made by the grand jurors in the course of their official proceedings, and the prosecutors did nothing to counter, or affirmatively joined in, the expression of race hatred.

III. Whether the Court of Appeals' conclusion that the issue whether a Veterans Administration fee appraiser is a public official for purposes of the bribery statute, 18 U.S.C. §201(a), is an issue of law

to be decided by the court
violates Petitioner's rights under
the Fifth and Sixth Amendments to
have each essential element of a
criminal offense decided by a jury.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE
JUDGMENT IS SOUGHT TO BE REVIEWED

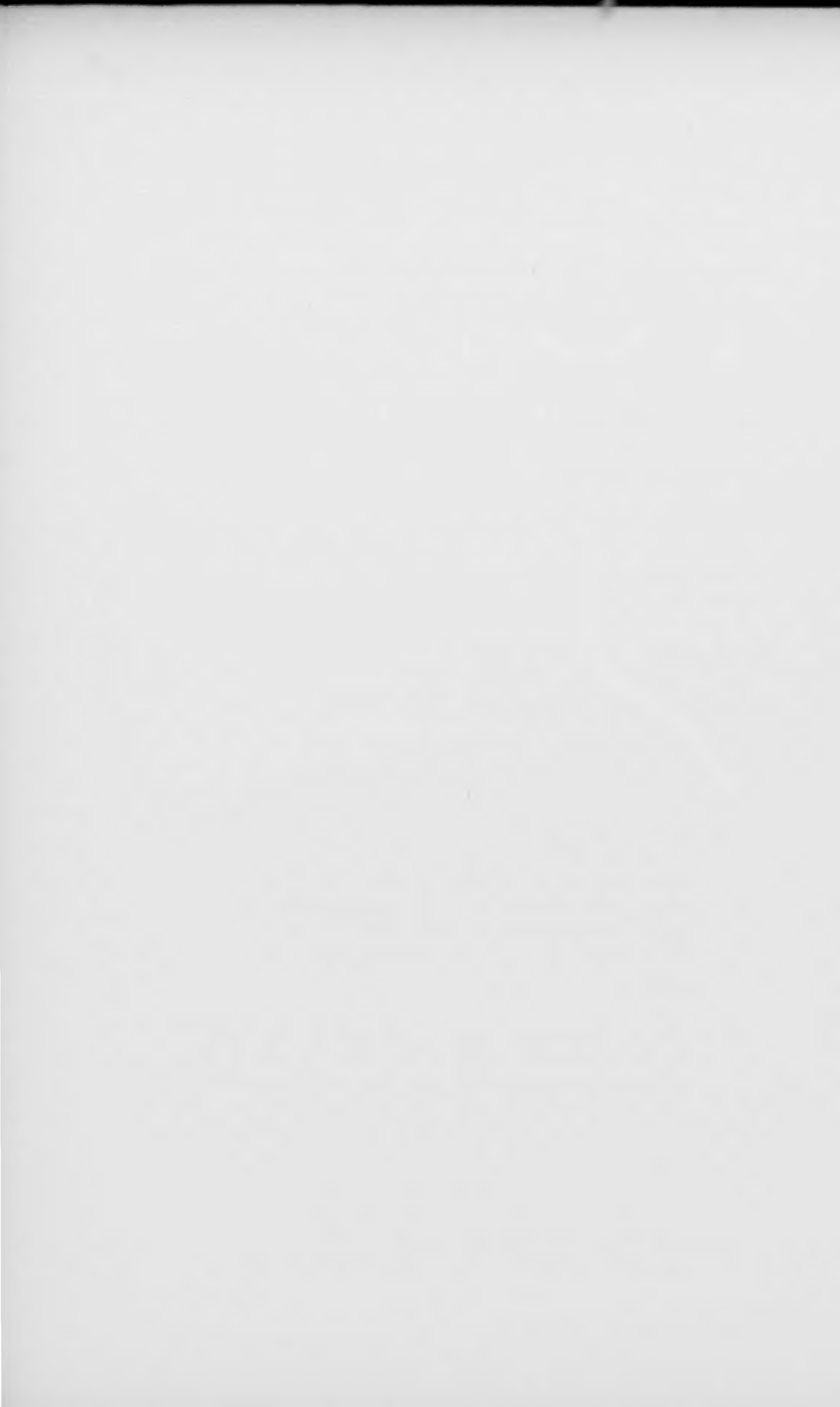
The parties in the court below were Michael J. Friedman, Steven F. Madeoy, and Jakey Madeoy, all defendants-appellants, and the United States of America, appellee.

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AND WHETHER, IN EITHER CASE, THERE
IS A PER SE RULE THAT AN INDICTMENT
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The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 912 F.2d 1486, and is set forth in the appendix at A-1. The district court's memorandum order of July 17, 1987 is not reported; it is reproduced in the appendix at A-20.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on August 10, 1990. (A-27) The petition for rehearing was denied by order entered on October 16, 1990. (A-29) This Court has jurisdiction to review the judgment of the Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part:



. . . nor shall any person . .
. be deprived of life,
liberty, or property, without
due process of law

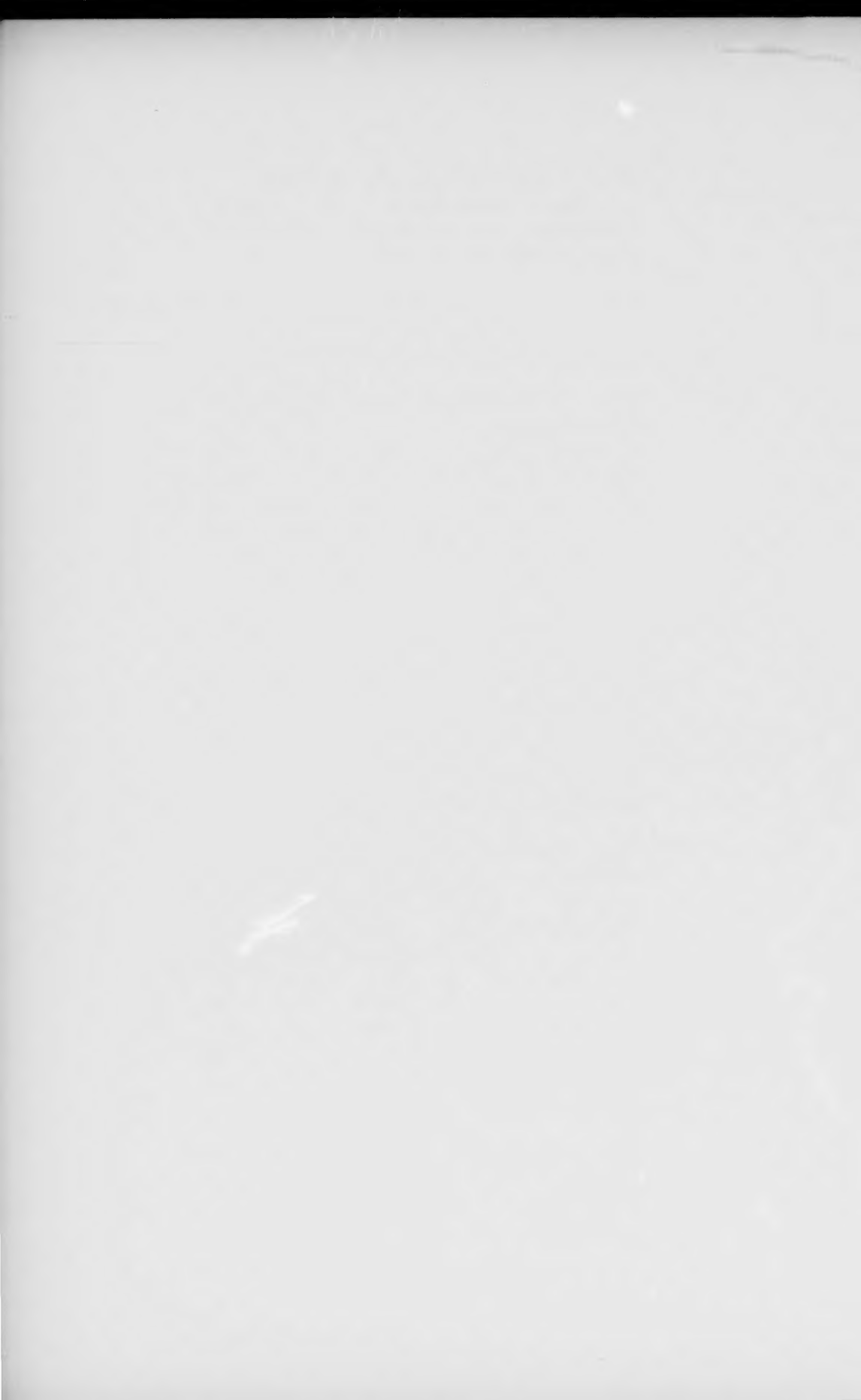
Rule 12 of the Federal Rules of Criminal

Procedure provides, in pertinent part:

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or



(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

* * *

(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a



1

motion, the court shall state its essential findings on the record.

(f) Effect of Failure To Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

* * *

(h) Effect of Determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.

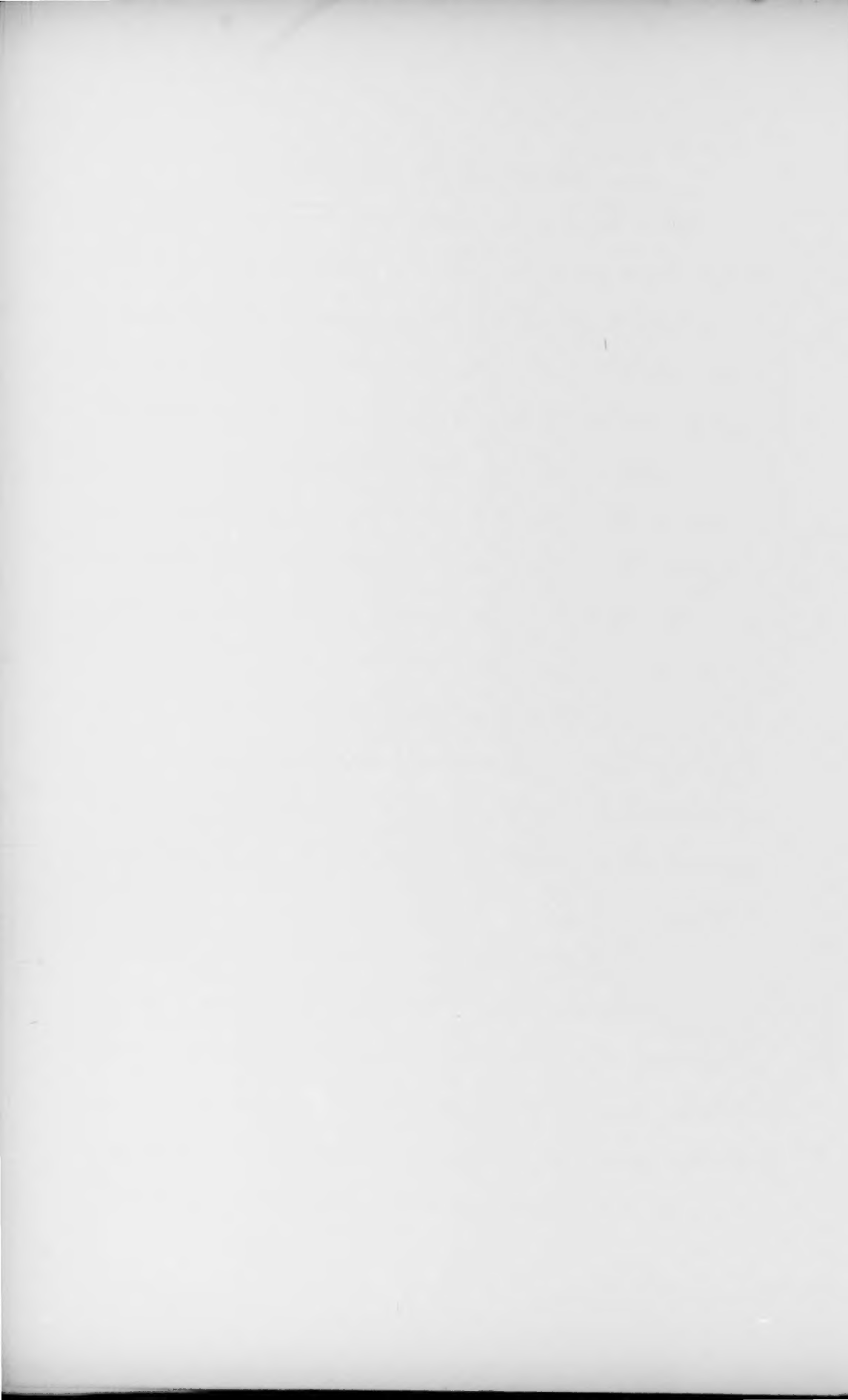
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STATEMENT OF THE CASE

This is a race case, but hardly a typical one. This is a case where black grand jurors, in a district which is predominantly black, discriminated on the basis of race against a white defendant, right in the federal courthouse and in the presence of federal prosecutors who did nothing to prevent, and indeed themselves encouraged, racial bigotry in the grand jury room. The fundamental question at the heart of this case is whether that racial discrimination will be treated the same as the more common, and equally odious, discrimination which has historically been practiced by whites against blacks in this country.

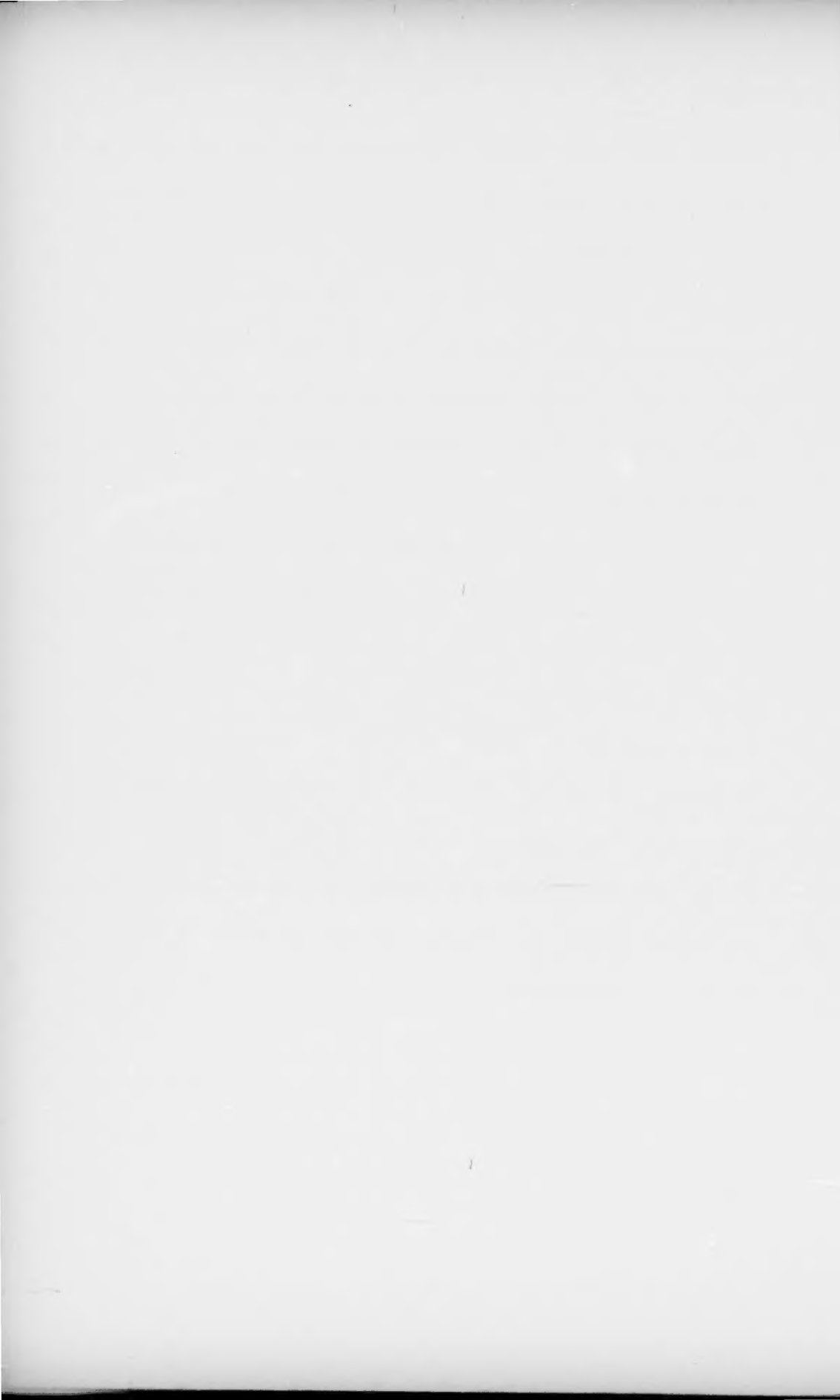
Petitioner's claim of racial discrimination by the grand jury which indicted him has not been adjudicated. The courts below, twisting Fed. R. Crim. P. 12 and distorting the facts, held that the claim was waived. Petitioner submits that, if he were a



black and had been indicted by white grand jurors who made the kind of racial remarks which were made in this case, the courts would not have used hypertechnical interpretation of the procedural rules to block consideration of his claim. The judges would have done more than shake their fingers and make pious pronouncements. In treating this case differently than the same case with the races reversed, the courts below have done a great disservice to whites and blacks alike. If left undisturbed, the "special" rules fashioned for this atypical case will be invoked by other judges to bar consideration of other claims of racial bias in the grand jury, including those where the discrimination is practiced by white grand jurors against minority accuseds.

* * *

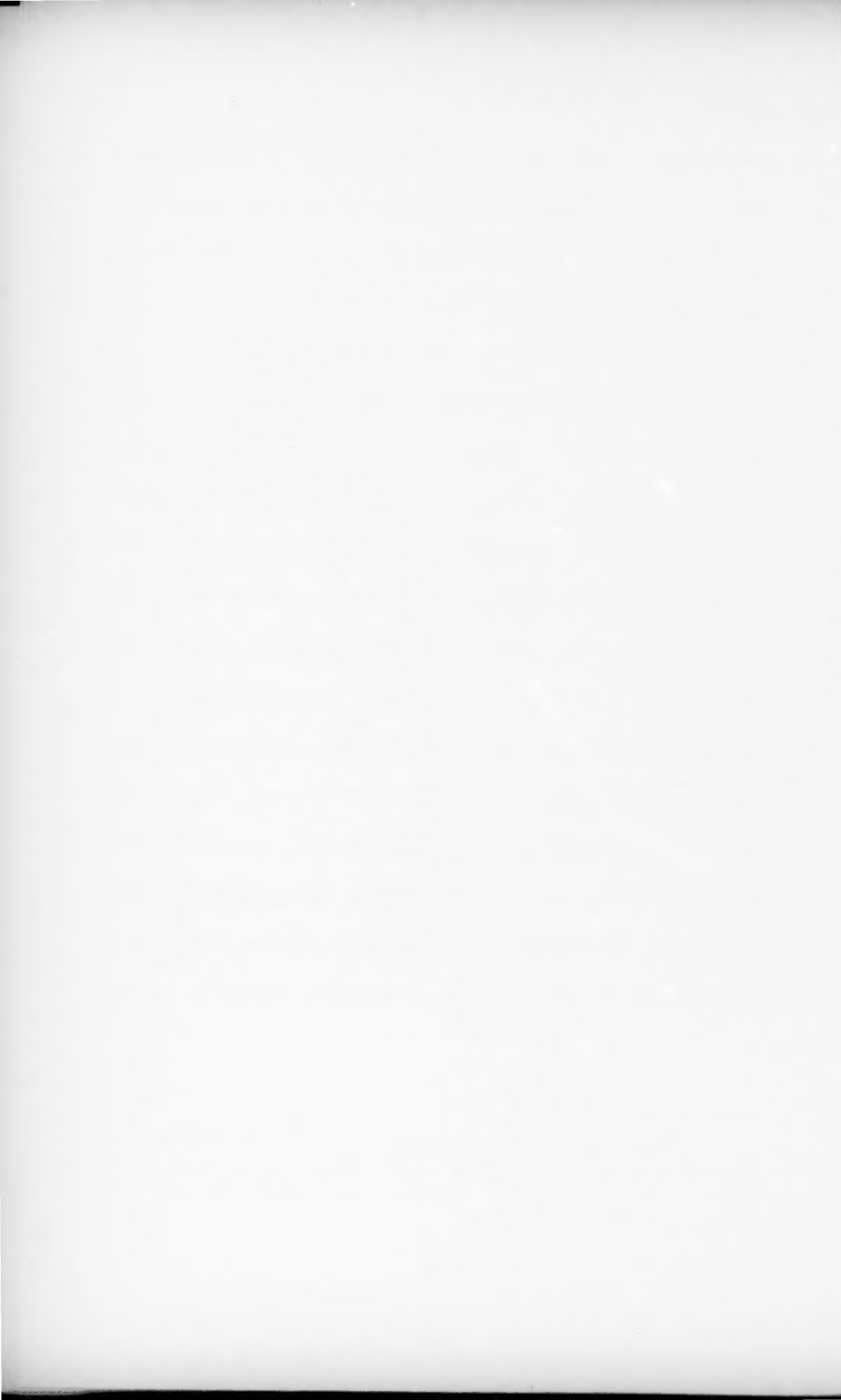
On November 5, 1986, a federal grand jury in the District of Columbia indicted Petitioner Michael J. Friedman, who is an



attorney, and several others. Petitioner Friedman and his co-defendants are white. The grand jury which returned the indictment against them was black.

The indictment alleged a scheme to defraud the United States Department of Urban Development's (HUD) Federal Housing Administration (FHA). (A-2)¹ Fraud in HUD's programs and operations -- including the alleged fraud which was the subject of this indictment -- have been blamed for a variety of ills in this nation's urban areas. According to recent front page stories in The Washington Post, fraud in HUD's loan insurance program destabilized established, lower middle class black neighborhoods, undermined rent control, displaced longtime renters, and left buildings abandoned, easy targets for

¹The alleged scheme involved fraud in procuring FHA insured mortgage loans for two-unit and four-unit rental properties in the District of Columbia.



takeovers by drug traffickers.² Thus, while the ostensible victim of the alleged fraud was the government, in the view of some, the ultimate victims were members of Washington's black community.

As the record they left behind reveals, the grand jurors saw the case -- and the defendants -- in racial terms. Their comments, recorded in the grand jury transcripts, reflected their view that this was an all-too-typical instance of whites ripping off blacks -- and using blacks to do

² See K. Downey, "The Real Price of Housing Fraud: As Speculators Turned Quick Profits, Longtime Tenants Lost Their Homes," The Washington Post, Sept. 2, 1990, p. 1, col. 1; K. Downey, "Anatomy of a Real Estate Scheme: Dealers Illegally Obtained Government-Backed Loans, Evaded D.C. Rent Control Law," The Washington Post, Sept. 2, 1990, p. A-15, col. 1; K. Downey, "FHA Fund Threatened By Widespread Fraud: Inflated Appraisals Skewed Taxes For Many District Property Owners," The Washington Post, p. A-15, col. 5; K. Downey, "The Euphoria of Easy Money: Many Drawn Into Fraud," The Washington Post, Sept. 3, 1990, p. A-2, col. 1; K. Downey, "Following The Twisting Trial of Fraud," The Washington Post, Sept. 4, 1990, p. A-1, col. 2.



it. Those transcripts also show that the prosecutors did nothing to discourage, and even joined in, the grand jurors' expressions of racial bias. Petitioner did not learn what had transpired in the grand jury room until his trial was about to commence.

Petitioner entered a plea of not guilty before the Honorable Harold H. Greene on November 12, 1986. Judge Greene ordered that all motions be filed by December 3, 1986, with opposition papers to be filed two weeks later. (App.55-56)³ The defense wasted no time in its pre-trial preparation. The next day, Petitioner's counsel requested voluntary discovery. He specifically requested information which might exculpate the Petitioner or which would be useful to a defense. Counsel also requested all Jencks material ten days before trial. (See Exhibit

³References in the form "App. ___" refer to the Appendix filed by the Petitioner in the Court of Appeals. References in the form "A-___" refer to the Appendix filed as part of this Petition.

A to Defendant Friedman's Motion for Pretrial Discovery)

In their response of November 17, 1986, government counsel claimed to be "anxious to provide . . . the material to which [the defense] are entitled," and "happy" to provide Jencks material . . . ten days before trial." (See Exhibit B to Defendant Friedman's Motion for Pretrial Discovery)

On November 20, 1986, Petitioner's counsel moved to withdraw. (App.56) The following day, new counsel from the lawfirm of Williams & Connelly, entered an appearance on Petitioner's behalf. (App.57)

Per Judge Greene's scheduling order, new counsel filed a number of pre-trial motions on December 3, 1990, including certain discovery motions, and motions to dismiss the indictment for defects apparent on its face. (App.58) The court disposed of the motion by opinion and order dated January 16, 1987. See United States v. Madeoy, 652 F.Supp. 371 (D.D.C.

1987). In addressing the defense motions for discovery, Judge Greene commended the government for its cooperative attitude toward discovery. Id. at 375.

As it turned out, the government's sense of fair play was illusory. The government had withheld from the defense the evidence in its sole possession which showed that black grand jurors harbored racial prejudice against the white defendants. This evidence -- in the form of grand jury transcripts -- showed that the government prosecutors had not only permitted multiple expressions of racial prejudice to go unchallenged in the grand jury, but appeared once to have joined in and endorsed the grand jury's expression of race prejudice. (See App.153-75)

The government had not disclosed this information to the defense prior to the deadline for pre-trial motions. Moreover, despite its agreement to provide Jencks material ten days before trial, it actually



provided the thousands of pages in installments beginning ten days before trial. The last installment was delivered on Friday, February 20, 1987. Trial was scheduled to begin on Monday, February 23, 1987.

Over the weekend, defense counsel found buried in this mountain of paper undeniable evidence of racial bias at work in the grand jury.

Snow closed the courthouse on February 23, 1987, so the parties appeared for trial a day later, on Tuesday, February 24, 1987. Immediately, before jury selection commenced, defense counsel brought the evidence of racial prejudice in the grand jury to the trial court's attention. (App.668, 671) Specifically, defense counsel informed Judge Greene that the grand jury transcripts they had recently received revealed that, on different occasions, three black grand jurors had made remarks reflecting racial prejudice against whites.

The first exchange occurred during the grand jury's questioning of Ritchie Gaylen, a white man, who testified about his role in the alleged conspiracy. Assistant United States Attorneys Tabackman, one of the two prosecutors who presented the case to the grand jury and who prosecuted the resulting indictment, was present. After the jury learned that most of the people who purchased properties or in whose names properties were purchased were black, the following occurred:

FIRST JUROR: But the money ended up in the white people's pocket. .

. .

SECOND JUROR: As always.

FIRST JUROR: As always.

AUSA [Tabackman]: That's correct. Are there any further questions?

(App.168-69, emphasis added)

The second exchange involved a third grand juror, the deputy foreperson, who was black, and Harriette McGinnis, a black witness. Assistant United States Attorney

Allison, the other prosecutor, was present.

DEPUTY FOREPERSON: You mean to say these people didn't look at this piece of property?

WITNESS: Half of them didn't know. No, they didn't....

DEPUTY FOREPERSON: I can't even believe that.

WITNESS: You'd be surprised what people will do for money.

DEPUTY FOREPERSON: And you being black all your life and you know that the white man takes you any damn time he can and you don't look to see?

(App.172, emphasis added). The stenographic record shows that the collective grand jury responded with "general laughter" to the deputy foreperson's extremely negative stereotype of whites. (App.172)

The third incident took place a week later, in Mr. Allison's presence, at Ms. McGinnis' second grand jury appearance, just one week before the grand jury returned this

indictment.

DEPUTY FOREPERSON: I sympathize with you, but I have a question. They're going to get mad with me when I say this.

JUROR: You're probably right.

DEPUTY FOREPERSON: You know, we've been -- we were born black, you know.

WITNESS: Definitely.

DEPUTY FOREPERSON: How could you have trusted them so?

(App.174, emphasis added).

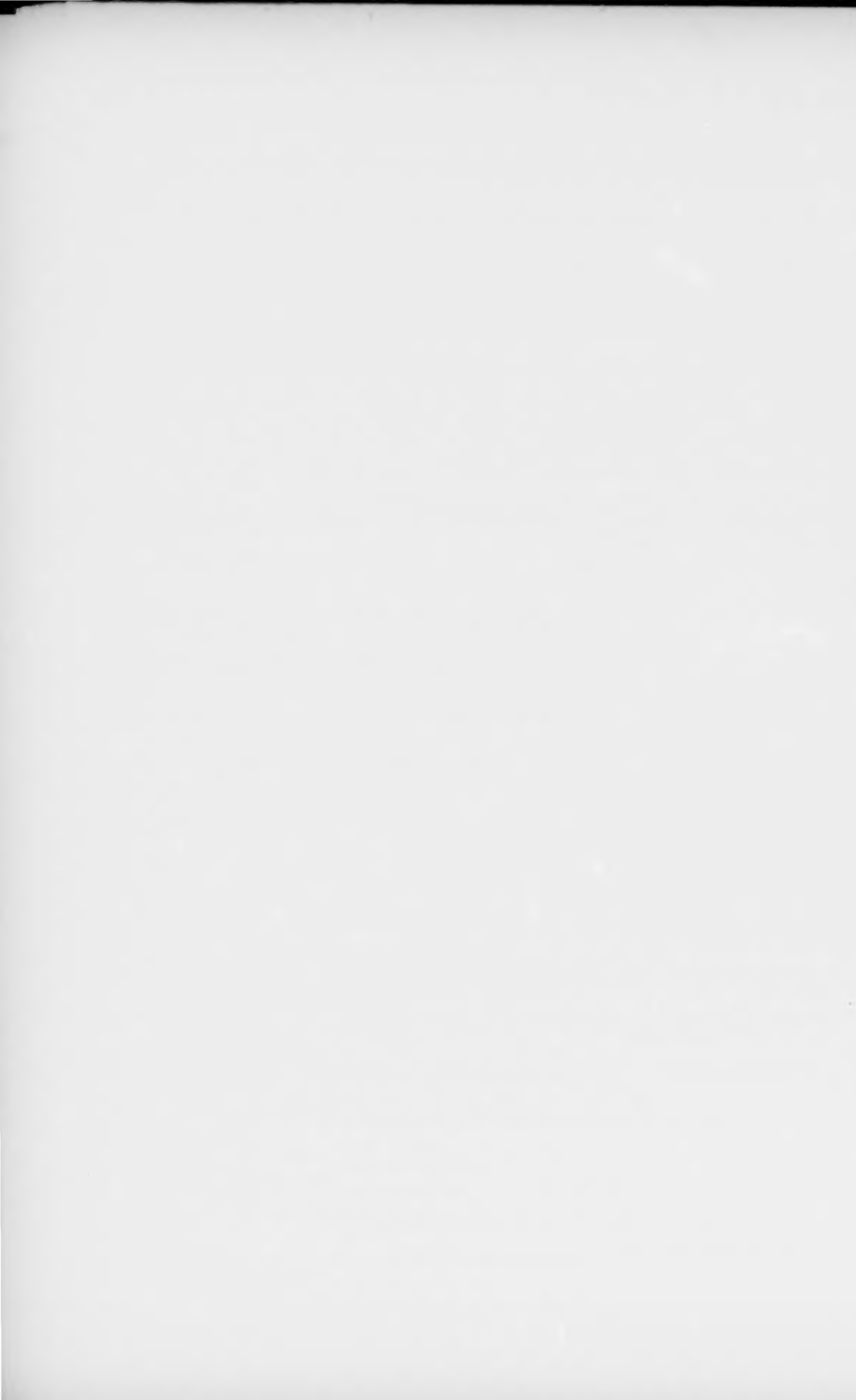
Defense counsel brought these facts to Judge Greene's attention and Prosecutor Allison confirmed that the incidents involving Ms. McGinnis had occurred. (A.678) He dispelled any notion that the comments were not serious ones, describing the deputy foreperson as "upset." He added that, as far as he could recall, these were the only

expressions of racial bias in the grand jury.⁴ (A.676-77) There was, however, no independent confirmation that these were the grand jury's only racial remarks; the defense lacked access to the complete set of grand jury transcripts and the prosecutors were plainly not the best persons to judge whether they or the grand jurors they supervised had committed additional improprieties.

Defense counsel expressed two concerns. With jury selection scheduled to begin that morning, the defense feared that the petit jurors might also harbor racial biases, and proposed additional voir dire questions to probe racial prejudice. (App.668)

Counsel also voiced concern that race prejudice by the grand jurors had tainted the indictment. Petitioner's counsel informed the court that he had directed his associates to research whether the facts just revealed would

⁴Mr. Tabackman, who was present in court, said nothing.



→ 1

support a motion for dismissal of the indictment or other relief. (App.675) While Petitioner's counsel did not formally ask for permission to file a motion at a later date,⁵ he made it clear that he intended to make a motion if the law would support it and he reminded the court that he had only recently gotten the transcripts. (App.675)

The court seemingly acquiesced, indicating only that the question was not presently before it. (App.682) At no time did the court indicate that, if a motion were going to be made, it would have to be made before trial began. At no time did the district judge indicate that he would put off choosing a jury or adjourn the trial so that the questions could be researched, and motion papers drafted.

The jury was chosen that day and the trial began. Over the weekend break, the

⁵Nor did he request any adjournment of the trial, a request which undoubtedly would have been denied.

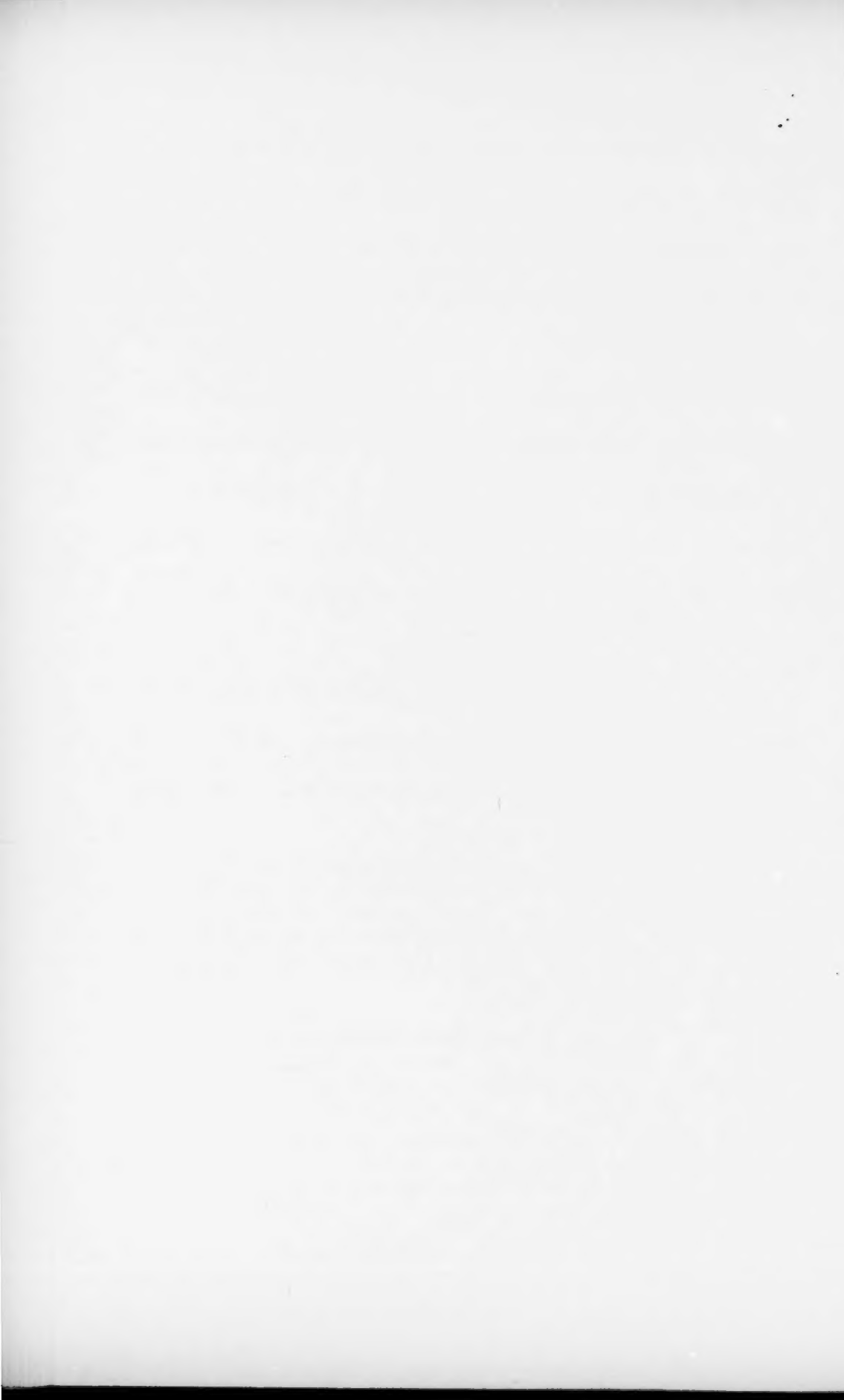
defense completed its research and drafted motion papers. On Monday, March 2, 1987, Petitioner, joined by his co-defendants, filed a formal motion, under Rule 12(b) of the Federal Rules of Criminal Procedure, to dismiss the indictment on the ground that the grand jury was motivated by racial prejudice. Alternatively, the defendants requested a hearing to inquire whether the grand jurors were influenced by race prejudice in voting to return the indictment. (App.153)

At a break in the next day's proceedings, the court advised the government that there was "no rush" to file a response.⁶ Ignoring

⁶Government counsel, adverting to the pressures of trial, expressed a desire to respond only after the trial ended. The court, however, directed the government to file its response after its own case was in. The court added:

If it turns out that the defense is right, then we're going -- I mean, it doesn't look like it to me, quite frankly, but if it does turn out after research the defense is

(continued...)



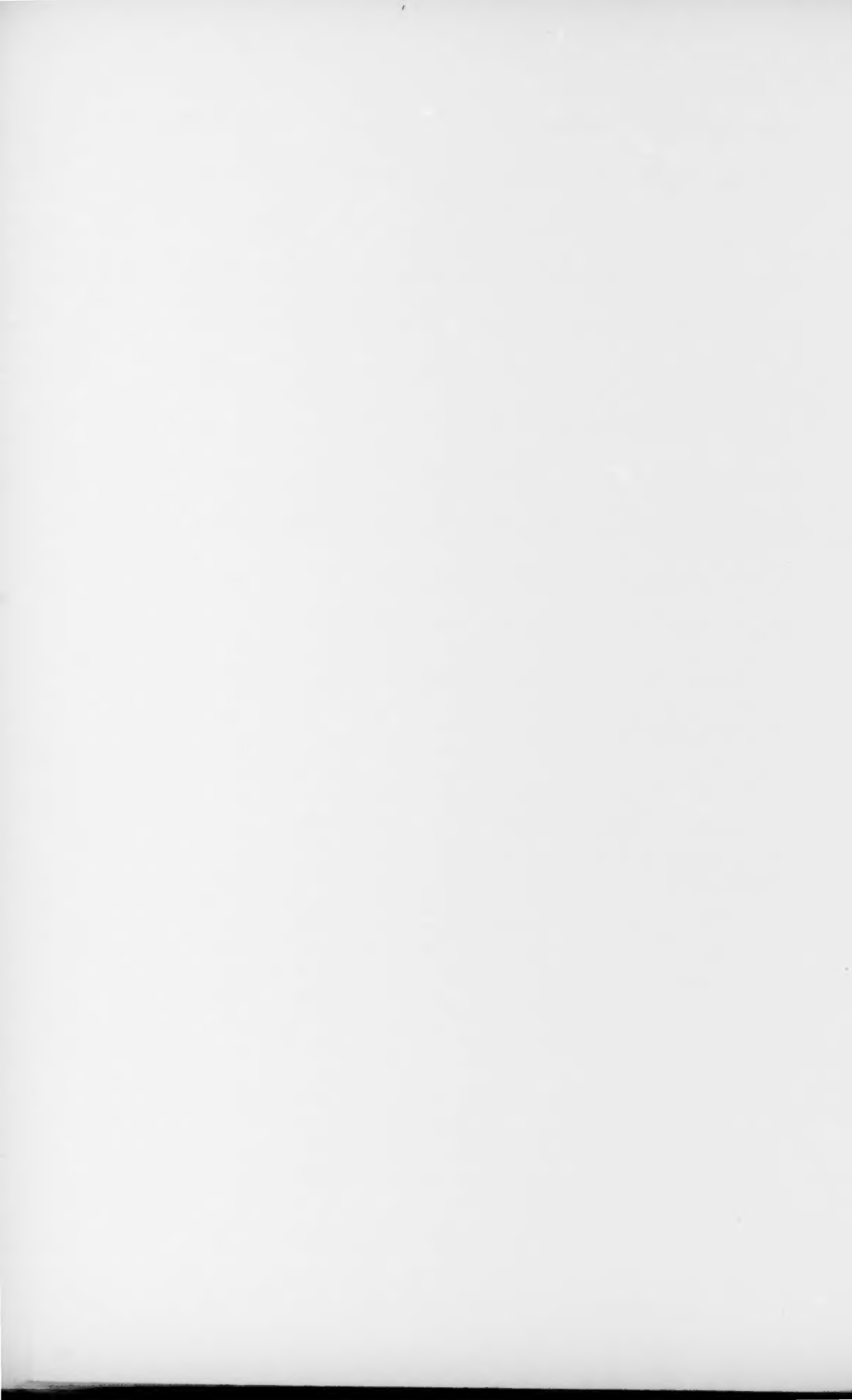
the defense request for a ruling on the motion before verdict,⁷ the court submitted the case to the jury more than five weeks later, without having received any response from the government and without having ruled on the motion.

The defense renewed its grand jury challenge in a post-trial motion (App.599) which was denied. (A-20) By memorandum order dated July 17, 1987, the district court ruled that the defendants' objection was "waived" because their lawyers did not raise it by motion prior to trial.⁸ (A-22)

⁶(...continued)
right, we are doing all
this for nothing.
(App.968)

⁷Counsel for Petitioner had asked for a ruling before the trial ended unless the government would agree not to argue that a guilty verdict would preclude consideration of the issue. The government stood mute. (App.968-69)

⁸There is no suggestion that the defendants themselves knowingly or voluntarily waived this Constitutional claim; any finding of waiver could be based only on their lawyers' conduct.



The court further ruled that the defendants were not entitled to relief from this waiver, because they could not demonstrate "actual prejudice." (A-22) The court reasoned that the effect of any racial prejudice in the grand jury "was overcome" when the petit jury rendered its verdict.

(A-25) The court added that it did "not doubt that due process protects a defendant from an indictment that is plainly the product of racial prejudice." (A-25) It held, however, that the facts did not demonstrate "such bias" by the grand jury "as a body." (A-26)

The Court of Appeals affirmed. It agreed that the defendants' failure to move to dismiss the indictment prior to trial constituted a waiver of their claim of grand jury bias. (A-6,7) And it refused to disturb the district court's refusal to grant relief from that waiver. (A-9) It held that, in deciding whether to grant relief from waiver, the court should consider the reason for the



defendant's tardiness and whether he has shown actual prejudice. (A-7) The Court of Appeals found neither prejudice nor excuse.

According to the Court of Appeals, there could be no excuse for failing to make the motion before trial, because the defense had discovered the offensive remarks before the trial started. (A-8) The Court rejected, or ignored, the argument that the failure to make the motion before trial began was justified in light of the need to research the law.

The Court further ruled that the defendants had not shown "actual prejudice." The Court reasoned that it was not likely that, but for the biased remarks, the grand jury would not have indicted the defendants on the same counts. (A-9) The Court ended its discussion with these words:

[D] e s p i t e o u r
determination that the
appellants have failed to
show actual prejudice, we
in no way condone the
racial bias revealed in
the comments made during
the g r a n d j u r y



proceedings. We are troubled not only by the grand jurors' remarks, but more so by the failure of the AUSA's who were present to admonish the speakers and to make clear that any biases they harbor must play no role in the matter at hand. Such official complacency, perhaps even opportunism, when racial bias infiltrates the criminal justice system is not tolerable. While the appellants appear not to have been victimized by it, the public suffers whenever the appearance of racial bias goes uncorrected in the courthouse.

(A-9)

REASONS FOR GRANTING
THE WRIT

I. THE COURT OF APPEALS'
AFFIRMANCE OF THE
DISTRICT COURT AND ITS
CONSTRUCTION OF RULE 12
TO FIND WAIVER IN THIS
CASE LEFT OUTRAGEOUS
RACIAL DISCRIMINATION IN
THE FEDERAL COURTHOUSE
UNADDRESSED AND
UNREMEDIED AND DEPRIVED
THE PETITIONER OF DUE
PROCESS OF LAW

The Court of Appeals for the District of Columbia Circuit has held that, under Fed. R. Crim. P. 12, a defendant's claim that he was indicted by a racially-prejudiced grand jury is waived if it is not made before trial. The Court so ruled even though, when racial prejudice infects the grand jury, that fact is almost always hidden in secret grand jury transcripts to which the defendant has no pre-trial right of access and even though the defendant's motion to dismiss based on grand jury prejudice was made within days of discovering the grand jury abuses.

In the instant case, portions of the

grand jury transcripts which revealed racial bias were found by defense counsel within a huge pile of Jencks material turned over to the defense just before the trial began.⁹ However, under the Court's unambiguous holding, waiver of any claims based on grand jury race bias occurs as soon as the trial begins regardless of when the defendant discovers that racial prejudice infected the grand jury. This is so even if the defense, though it has exercised due diligence, first learns the facts after the trial has begun,¹⁰

⁹ It is not inconceivable that the government produced Jencks material immediately before trial rather than after the witnesses' direct testimony, in a conscious effort by the prosecutors to appear to be forthcoming while simultaneously depriving the defendants of any meaningful opportunity to use the information demonstrating race prejudice in the grand jury.

¹⁰ The Court of Appeals said:

A defendant who receives Jencks Act material only after his trial has begun, and is thus first apprised of the facts upon which the motion to
(continued...)



even if the defense makes its motion immediately upon learning the facts, and even if the government has participated in and profited from the grand jury prejudice, and hidden the evidence of it from the defendant.

The Court of Appeals' ruling violates the Fifth Amendment. The Constitutional guarantee of due process means that a defendant must be afforded a reasonable opportunity to present his Constitutional claims before court rules or procedures can bar their assertion. See Michel v. Louisiana, 350 U.S. 91 (1955); Reece v. Georgia, 350 U.S. 85 (1955). Due process thus forecloses any reading of Rule 12 which renders claims like Petitioner's waived before a reasonable time to assert them has passed.

The Court of Appeals' cramped reading of

¹⁰(...continued)
dismiss the indictment is based, may be in a position to argue good cause for his failure to have moved for dismissal prior to trial.

(A-8, emphasis added).



the "relief from waiver" provision of Rule 12(f) does not solve the problem. Whether a defendant is to be given a reasonable time to assert his Constitutional claims cannot rest in the essentially unreviewable discretion of the district courts.¹¹

The Court of Appeals has rewritten Rule 12 in a particularly mischievous fashion. While purporting to rely on decisions of this Court which construed former Rule 12, such as Davis v. United States, 411 U.S. 233 (1973), and Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963), the Court went far beyond the holdings or the reasoning of those cases.

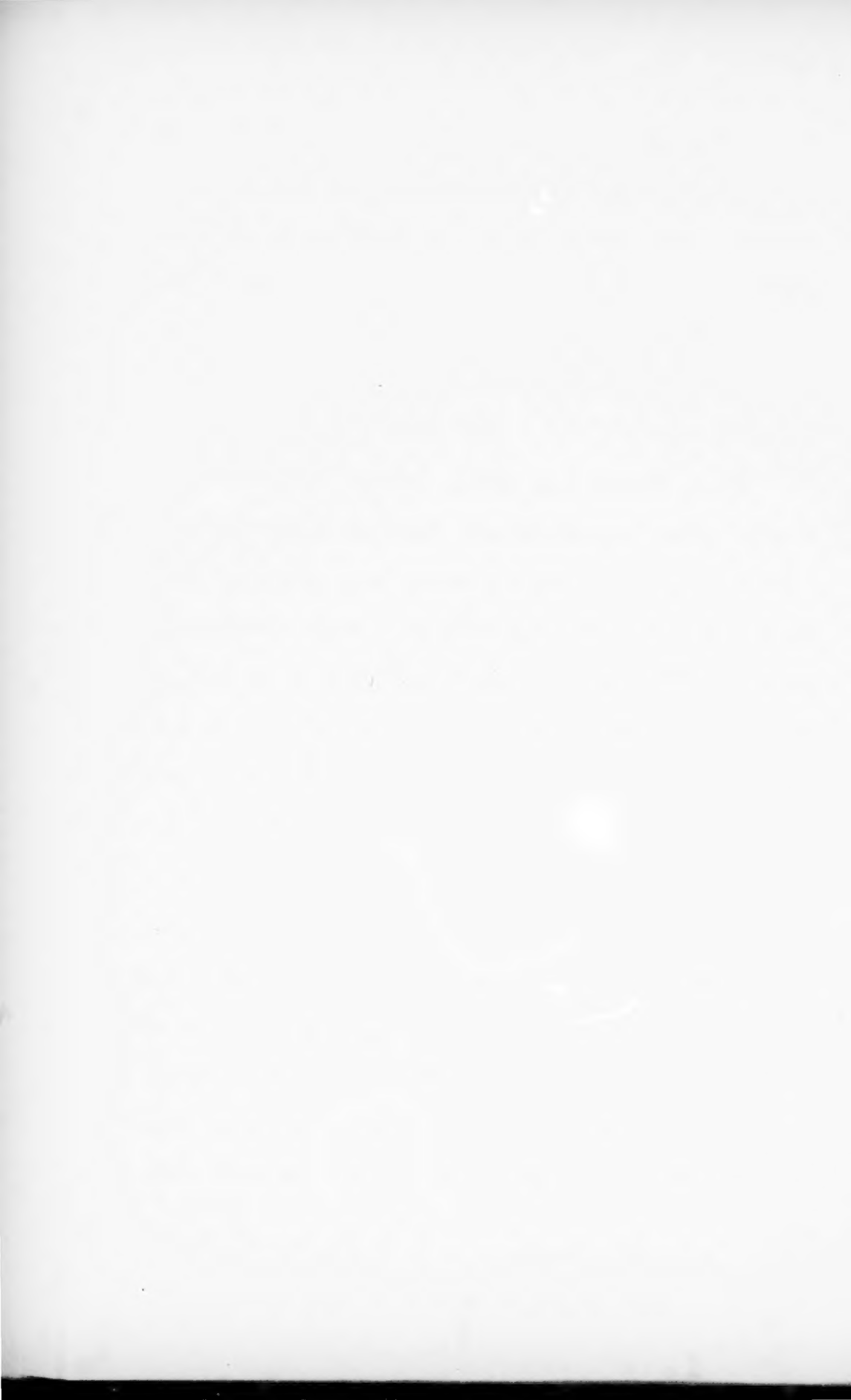
The Court of Appeals' decision also ignores the plain teaching of more recent

¹¹Moreover, given the Court of Appeals' reading of the relief from waiver provision, district courts should never exercise their discretion to grant a defendant relief; a defendant will rarely be able to demonstrate legally cognizable excuse for his unavoidable "procedural default," and will never be able to demonstrate prejudice from the court's refusal to decide his claim, as the Court of Appeals has defined those requirements.



cases such as Vasquez v. Hillery, 474 U.S. 254 (1986), Mechanik v. United States, 475 U.S. 66 (1986), and Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), pertinent precedents on the remediability of improprieties and misconduct involving the grand jury.

) This Court has quite properly held that racial discrimination in the selection of the grand jury is intolerable, and grounds for dismissal of an indictment, even where the petit jury has rendered a verdict after a trial free from any taint of racial bias. Vasquez v. Hillery, 47 U.S. 254 (1986); see also United States v. Mechanik, 475 U.S. 66, 70 n.1 (1986). Where improprieties have occurred in the grand jury itself, this Court has held that dismissal of an indictment is appropriate if the improprieties substantially influenced the grand jury's decision to indict or if there is grave doubt as to whether the improprieties substantially influenced the



decision. Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). Yet, the Court of Appeals' ruling necessarily means that meritorious claims of unconstitutional racial discrimination in and by federal grand juries, encouraged or condoned by federal prosecutors, will escape judicial scrutiny; they will have been waived, by operation of law, before the defendant has any way to know that he has been the victim of racial discrimination or of official complacency in the face of such discrimination.¹²

¹² Justice Marshall's comments, in his dissent in United States v. Mechanik, 475 U.S. 66, 81-82 (1986), about violations of Rule 6(d) are equally pertinent here:

[V]iolations are difficult for defendants to uncover. The grand jury conducts its investigation in secret, aided only by the prosecutors and witnesses. United States v. Calandra, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). Defendants are not entitled to grand

(continued...)



¹²(...continued)

jury transcripts before trial; due to the strictly enforced tradition of grand jury secrecy, defendants generally have access to no information whatsoever regarding the conduct of the grand jury proceedings. See M. Frankel & G. Naftales, *The Grand Jury* 81-89 (1977). Requests by defendants pursuant to Rule 6(e)(3)(C)(ii) for disclosure of grand jury materials, "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury," are rarely granted; a defendant often can make the necessary showing only with the aid of the materials he seeks to discover. See 1 C. Wright, *Federal Practice and Procedure* §108, pp.263-265 (2d ed. 1982). Defendants' only access to grand jury materials is likely to be through the medium of the Jencks Act, 18 U.S.C. §3500, which requires the prosecutors, after direct examination of a

(continued...)



The holding does not simply make a mockery of the principle that the federal courts will not tolerate racial prejudice. It makes the courts knowing participants in proceedings borne of officially-sanctioned racial hatred. Pious condemnations of

¹²(...continued)
government witness, to produce the witness' prior statement. That disclosure, however, does not take place until after trial has begun, and then only on a piecemeal and incomplete basis.

There is thus little likelihood that a defendant can raise a substantial claim under Rule 6(d) before his trial begins.

For the same reasons, there is little likelihood that the defendant can raise a substantial claim of grand jury bias before his trial begins. Unless the acts of racial prejudice occur during the grand jury appearance of the defendant or a witness friendly to the defendant, the grand jury secrecy rules, Fed. R. Crim. P. 6, virtually guarantee that the defendant will not become aware of them. Those however are the occasions on which grand jury prejudice is least likely to be apparent.



prejudice come to nothing if the federal courts will not act in cases like this one.

Hiding behind the Federal Rules of Criminal Procedure will not do. The Court of Appeals' holding -- that a challenge to grand jury racial prejudice which is known to the prosecutors and tolerated or encouraged by them is waived if not made before the trial begins -- does not even comport with the language of Rule 12. Rule 12 is specific, and says something different. Rule 12(b) identifies certain motions which may, or which must, be made before trial. Among those in the "must" category are "defenses and objections based on defects in the institution of the proceeding." Rule 12(b)(1). Rule 12(c) provides that "[u]nless otherwise provided by local rule, the court may, at the time of arraignment . . . set a time for the making of pretrial motions or requests." Under Rule 12(f), waiver occurs if a party fails to raise objections which must be made



before trial "by the time set by the court pursuant to subdivision (c)."¹³ See United States v. LaRouche Campaign, 682 F.Supp. 610 (D. Mass. 1987).

Petitioner's objection may not even fall within Rule 12(b)(1). Rule 12(b)(1) deals with "defects in the institution of criminal proceedings," and could be limited to challenges which do not turn on access to grand jury minutes, since those minutes are generally discoverable, if they are discoverable at all, under the Jencks Act

¹³ Although in Petitioner's case a formal motion was not filed until four trial days after the issue had first been raised with the district court, it would hardly do violence to plain English to say that, when the facts were presented in detail to the district judge before voir dire, the issue had been "raised prior to trial," within the meaning of the Rule 12(b). Such a reading of the Rule, limited to circumstances like these, does not threaten to destroy Rule 12's timeliness requirement or otherwise to open a flood gate for those who would prefer not to bring on a grand jury motion prior to trial for fear of reindictment.



during the trial.¹⁴ But even if Rule 12(b)(1) covers claims of grand jury misconduct, waiver of those claims cannot occur unless the defendant has had a reasonable opportunity to assert them, even if the trial has already begun.¹⁵ If factual grounds for a challenge

¹⁴This narrower construction would be consistent with the Rule's purpose. Rule 12 was designed to cover challenges which, by their nature, are obvious on the face of the indictment or otherwise ascertainable by the defense, prior to trial. Matters which occurred in the grand jury and which, because of grand jury secrecy rules, are not ascertainable by the defense at all, or at least not until the government produces grand jury transcripts it is obligated to disclose under the Jencks Act, do not fit comfortably into those categories. A construction of Rule 12 which excluded such challenges from the time requirements of the Rule would thus be appropriate.

¹⁵If the Petitioner's motion to dismiss the indictment for officially-tolerated or officially-encouraged grand jury bias revealed in the grand jury transcripts produced under the Jencks Act is a motion which must be made before trial, and if the district court had, accordingly, applied Rule 12(f), it would have to have considered whether there was good cause for the failure to have made the motion before the date set for pre-trial motions. Plainly, there was a legally recognized excuse for not having made the motion by that date. The defendants simply had no knowledge and no

(continued...)



are discovered just before trial, defense counsel should not be forced to act immediately, or forever lose the opportunity to act at all. An attorney is not required to "shoot from the hip," without researching the pertinent precedents which would both enable him to make a professional judgment about the legal validity of the challenge and permit him to bring to the court's attention the relevant authorities.¹⁶

¹⁵(...continued)

way of knowing that grounds for a motion lay at that time. See Murray v. Carrier, 477 U.S. 478, 488 (1986) (cause exists for a state procedural default, and thus the default will not bar federal habeas corpus review, where the factual basis for a claim was not reasonably available to defense counsel).

¹⁶Forcing a lawyer to act immediately creates an inherent conflict between the lawyer, who must strive to be lawyerlike and professional in his dealings with the court, and the defendant, whose ability to assert a claim would depend on his lawyer's acting in an unlawyerlike and unprofessional manner.

In this case, counsel, aware of his obligations to the court and to his client, advised the district judge that he needed an opportunity to research the law, and, if justified, to file a motion. The district
(continued...)

The Court of Appeals' holding is not suggested or compelled by any decision of this Court. This Court has never held that defense challenges to an indictment based on racial improprieties by the grand jury are covered by Rule 12(b)(1). Nor has this Court suggested or held that a defendant forfeits his right to challenge such misconduct where the government has withheld the evidence of it from him, and the defendant raises his claim promptly upon learning it, only days into a lengthy trial. Davis and Shotwell, upon which the Court of Appeals relied, were very different cases.¹⁷ In Shotwell, the defendants first attacked the

¹⁶(...continued)

court seemed to acquiesce. The government voiced no objection. If the court did not by such acquiescence grant either relief from the waiver or an extension of time to make the motion, see Fed. R. Crim. P. 12(f), it certainly lulled the defendant into believing that it had done so.

¹⁷Both were decided under the former Rule 12, which contained a different waiver provision. Both predated this Court's recent decisions concerning the fundamental importance of eliminating racial discrimination from the grand jury.



grand jury array (though not, apparently, on the basis of racial discrimination) four years after their trial and conviction on federal charges. This Court held that they had "lost these objections by years of inaction." 371 U.S. at 362. The Court also noted that the district court had made findings of fact regarding when the challenge could first have been brought.

Davis v. United States, 411 U.S. 233 (1973), does not support the Court of Appeals' ruling, either. By motion under 28 U.S.C. §2255, Davis, a federal prisoner asserted, for the first time, a claim of unconstitutional racial discrimination in the composition of a grand jury, three years after his conviction. As in Shotwell, this Court again cited the district court's findings concerning the absence of excuse. Id. at 243.¹⁸ The Davis

¹⁸In Petitioner's case, the district court made no inquiry into or findings concerning when the defense first learned of the improprieties of the prosecutors and the grand
(continued...)



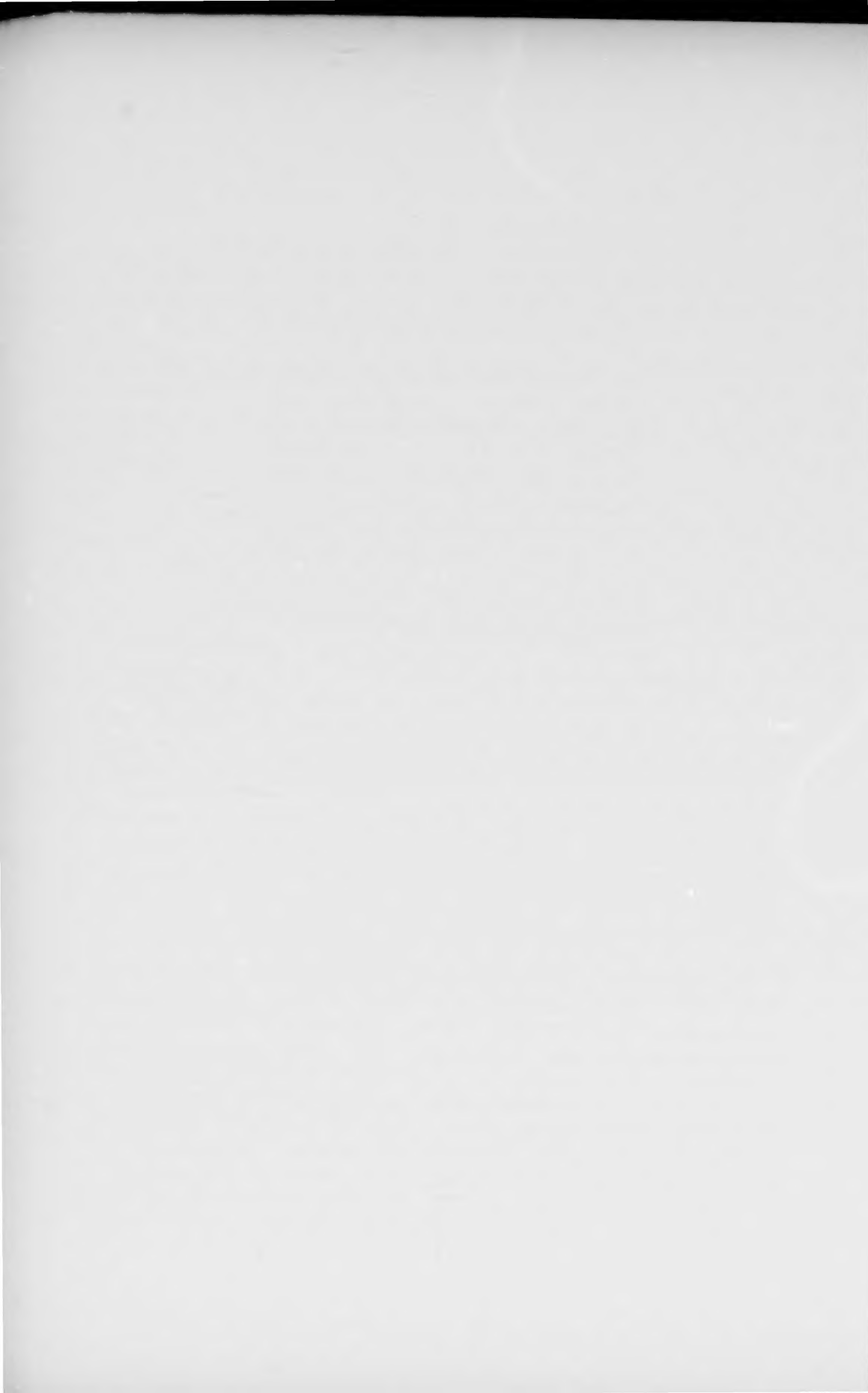
¹⁸(...continued)

jurors and when they might reasonably have acted on the discovery. The district court's decision in fact grossly misstates the scanty record which did exist, stating only:

Although defendants imply that they lacked an earlier opportunity to raise the issue, the fact is that the government turned over the grand jury transcript to them at least ten days prior to the trial -- ample time within which to raise the issue properly.

These facts are contrary to the record. While the government had, indeed, promised to turn Jencks Act transcripts to the defense ten days before trial, it in fact began providing the transcripts in installments ten (not more than ten) days before trial. The last installment was delivered the Friday before the trial was to begin. The offending remarks and prosecutorial inaction and/or concurrence may have been within transcripts delivered in the very last batch.

Further, possession of the transcripts was not equivalent to knowledge of their contents. Jencks Act material is made available to the defense, and used by defense counsel, for cross-examination of prosecution witnesses. Although the record shows that the defense attorneys began their review of the transcripts upon receiving them, before any witnesses had testified, the record is silent as to the order in which the reading took place, when defense counsel came upon the
(continued...)



Court expressed concern that refusal to enforce the waiver provisions of the former Rule 12 would encourage tactical withholding of claims.

¹⁸(...continued)
racist incidents, or when the pattern of racist remarks emerged. But one thing is clear: the record does not support the district court's assertion, critical to its ruling, that the defense had "at least ten days prior to trial to raise the claim."

The Court of Appeals recognized the error in the district court's reading of the factual of record. It noted that, "During the ten days prior to trial, the Government gave the appellants about 2000 pages [of Jencks Act material], in installments, the last of which was apparently received on the Friday before the Tuesday when the trial started." (A-8) But the Court of Appeals then deemed these facts irrelevant because the defendants "concededly discovered the offensive comments before trial." (A-8) Without knowing when before trial the discovery was made, the Court of Appeals' premise does not justify its result -- unless the rule is that a motion must be made immediately upon learning the facts upon which it is based. This cannot be the law, for an attorney is ethically foreclosed from making motions unless he believes that they are supported by fact and by law. Cf. Fed. R. Civ. P. 11 (attorney may not make motion unless he believes "after reasonable inquiry" that it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law).



Those concerns are absent here. Petitioner did not "sleep on his rights through years of inaction." His motion was made within a week of discovering the factual grounds for it, and as soon as the necessary legal research and drafting could be done. He did not hold his claim in reserve waiting to see what the jury verdict would bring; on the contrary, he explicitly requested a ruling on his claim before the case was sent to the jury. And the court's ability to decide the claim of discrimination in the grand jury was exactly the same when the motion was made as it would have been if made a few days earlier.

Thus, granting relief from waiver where the defendant has brought a challenge to grand jury bias within days of discovering it and long before his trial has ended would not encourage the holding back of claims for tactical reasons. Refusing to grant relief from waiver will, however, embolden prosecutors to engage in, permit, and profit

from racial discrimination in the grand jury proceedings they oversee. It will also encourage prosecutors to sandbag defendants by withholding the evidence of wrongdoing until the time when the defendant will be in the worst possible position to act on it.

Both courts below also erred in analyzing prejudice. The district court ruled that the defendants could not have been prejudiced by racial bias in the grand jury because the effect of grand jury prejudice was overcome when the petit jury returned its verdict. This analysis does not survive Vasquez v. Hillery, 474 U.S. 254 (1986), where this Court reaffirmed that racial discrimination in the grand jury does not become harmless after a petit jury has convicted.

The Court of Appeals eschewed the district court's analysis but adopted one which is equally flawed. It held that a defendant must show actual prejudice, and that

three isolated remarks made in the course of lengthy hearings were all that the defendants could point to. According to the Court, it was not likely that "but for the remarks, the grand jury would not have indicted . . . on the same counts." (A-9)

The analysis is specious. On this record, it cannot be assumed that these three examples of expressions of racial bias by the grand jury were all that occurred; the defendants were denied the hearing they requested to explore the full extent of grand juror bias. Moreover, these three incidents were more than enough to show that the proceedings were tainted by race bias. The transcripts to which the Petitioner pointed recorded not only general, collective laughter by the grand jury, but a total failure to act in the face of multiple racist remarks, if not active approval of them, by the official representatives of the government.

Equally significant, the Court of Appeals



miscomprehended the nature of the defendants' claim. Their claim was not that these improper remarks affected the grand jury. Their claim was that the grand jurors who made and ratified these remarks were biased against them on racial grounds, and that the prosecutors, through inaction and concurrence, legitimated the voting of an indictment for racial reasons.

Violation of the right to a racially unbiased grand jury is presumptively prejudicial. Discrimination in the selection of the grand jury is presumed to prejudice in part because it can be presumed that a discriminatorily selected grand jury would treat defendants of excluded races unfairly. Mechanik v. United States, 475 U.S. 66, 71 n.1. A fortiori, prejudice must be presumed when the grand jurors themselves in the course of performing their official duties show, by their own utterances, that they harbor prejudice against the defendants' race. After



all, individual grand jurors selected under procedures which exclude members of a particular race may still treat members of the excluded race fairly. Where, as here, it is the grand jurors themselves who voice racial biases, and whose conduct is ratified by the prosecutors, then it cannot be assumed that this grand jury can and will treat defendants of the disfavored race fairly, especially in cases like this one which have a racial element.

To be sure, reversal of a criminal conviction entails substantial societal costs. But these costs are ones which could have been avoided had the government prosecutors refused to allow race prejudice to taint the grand jury proceedings; had they made early, rather than eleventh-hour, disclosure of the wrongdoing in the grand jury; or had the district court acted promptly on the motion which was made. No societal costs will be incurred if the government takes care that



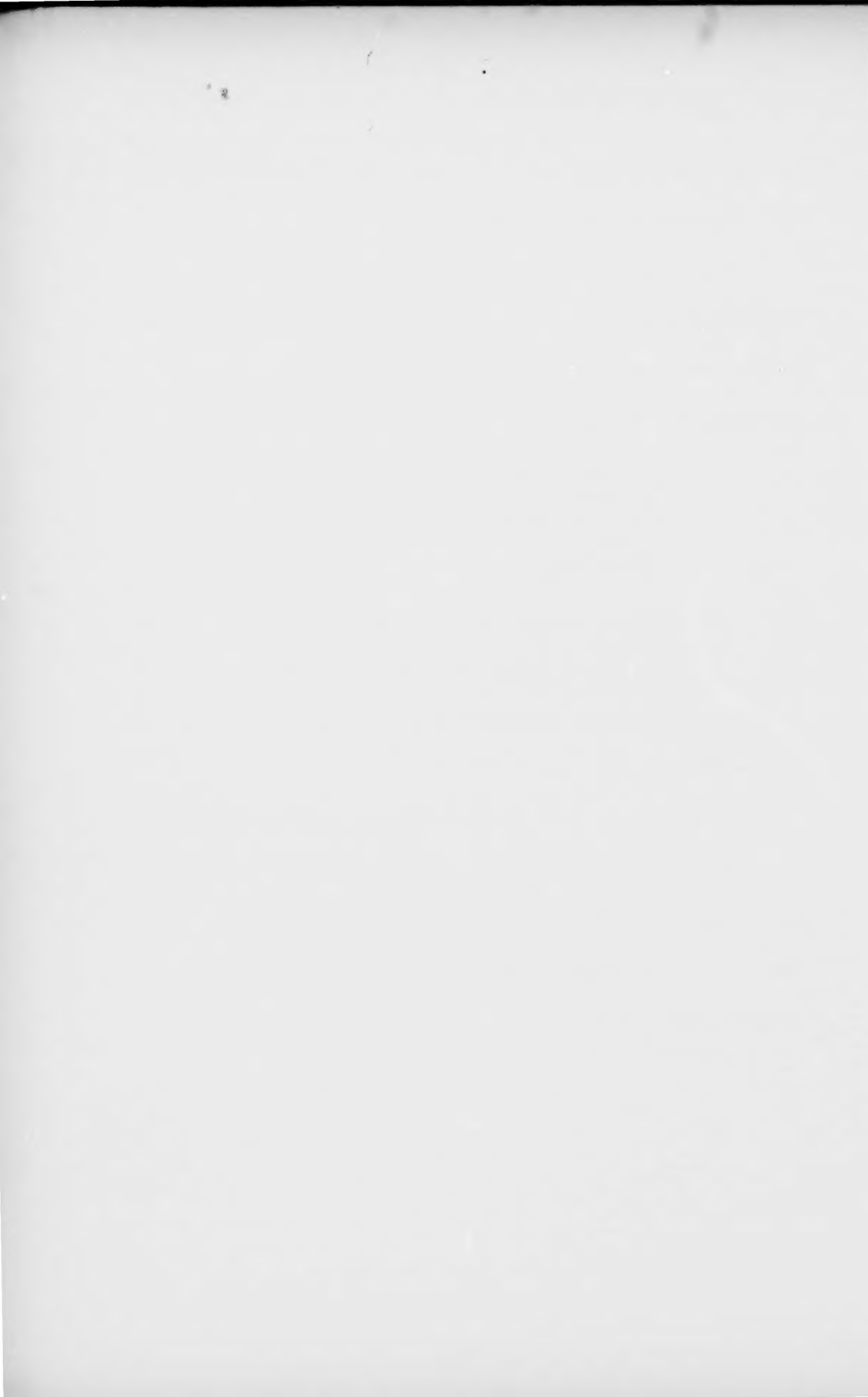
racial discrimination not be permitted to infect grand jury proceedings.

The societal costs of refusing to confront the Constitutional issue raised are, on the other hand, enormous. In one respect, the Court of Appeals was absolutely right.

[T]he public suffers
whenever the appearance
of racial bias goes
uncorrected in the
courthouse.

"[W]hen racial bias infiltrates the criminal justice system," complacency by the courts -- no less than by government prosecutors -- is "intolerable."

The petition for a writ of certiorari should be granted to consider whether Rule 12 permits -- or mandates -- complacency and inaction in the face of racial bias in the courthouse, as the Court of Appeals has held.



II. THIS COURT SHOULD
GRANT CERTIORARI TO
CONSIDER WHETHER THE SAME
RULE APPLIES WHETHER
RACIAL DISCRIMINATION IS
PRACTICED BY WHITES
AGAINST BLACKS OR BY
BLACKS AGAINST WHITES,
AND WHETHER, IN EITHER
CASE, THERE IS A PER SE
RULE THAT AN INDICTMENT
IS VOID WHERE OVERT
RACIST REMARKS WERE MADE
BY THE GRAND JURORS IN
THE COURSE OF THEIR
OFFICIAL PROCEEDINGS, AND
THE PROSECUTORS DID
NOTHING TO COUNTER, OR
AFFIRMATIVELY JOINED IN,
THE EXPRESSIONS OF RACE
HATRED

The constitutional question this case presents is whether an indictment is void when it is returned by a grand jury which has made manifest its racial biases against the defendants' race in the course of its official proceedings. The real underlying question may be whether racial discrimination in the courthouse will be treated the same whether it is practiced by whites against minority races or by "minorities" against whites. Both the district court and the Court of Appeals



assumed that all federal defendants, white or black, have a right guaranteed by the Fifth Amendment to a grand jury free of racial bias and racial prejudice. Those courts, in addition, recognized the unambiguously racist nature of the grand jurors' statements in this case. Petitioner respectfully submits that, if white grand jurors considering the indictment of a black person made "us" against "them" statements like those made here, and the prosecutors took no steps to make clear that racial bias could have no part in the grand jury proceedings, the courts would have acted -- regardless of when the defendant raised his claim of racial discrimination. Indeed, a federal judge could have acted sua sponte on these facts, to protect the integrity of the courts, without awaiting any defense motion. Petitioner submits that the manipulation of Rule 12 to find waiver in this case reflects disparate treatment of racial discrimination when it is practiced by blacks,



rather than against blacks. The courts' failure to take seriously the black against white discrimination in this case is itself such a departure from acceptable judicial conduct that it merits review by this Court.

Petitioner also submits that the unprecedented waiver rulings below may rest on the judges' unspoken, but nevertheless real, reluctance to face what they perceived to be the implications of recognizing the Constitutional right which they both insisted exists. This reluctance apparently stems from the courts' desire to avoid judicial inquiry into the basis for a grand jury's decision to indict. But vindication of the defendant's right not to be tried on an indictment which is the product of grand jury proceedings infected by racial bias need not mean judicial intrusion into the thought processes or behavior of individual grand jurors. Dismissal of the indictment is appropriate on the record which presently exists, without the

necessity for any further inquiry, for that record shows that the grand jury process was tainted by overt racism which the federal prosecutors ignored or affirmatively joined. A per se rule should be established under which such an indictment must be deemed void.

In Costello v. United States, 350 U.S. 359, 363 (1956), this Court said, in dictum, that the Fifth Amendment requires "a legally constituted and unbiased grand jury." See also Beck v. Washington, 369 U.S. 541 (1962); Lawn v. United States, 355 U.S. 339, 349-50 (1958). What "unbiased" means is, however, unclear. For the most part, the reported cases concern grand jurors' alleged bias as a result of their exposure to prejudicial publicity, not racial bias of the grand jurors against those of the defendant's race. For the most part, the courts have rejected claims of grand jury bias. See generally J. Bartlett, Defendant's Right to an Unbiased Federal Grand Jury, 47 Boston U.L. Rev. 551

(1967). But grand jury bias in the form of racial prejudice raises different concerns, and mandates a different judicial response.

This Court has repeatedly held that a conviction cannot stand where the indicting grand jury is the product of racial prejudice or racial discrimination. See, e.g., Vasquez v. Hillery, 474 U.S. 254 (1986), citing Neal v. Delaware, 103 U.S. 370, 396 (1881); Bush v. Kentucky, 107 U.S. 110 (1883); Gibson v. Mississippi, 162 U.S. 565 (1896); Carter v. Texas, 177 U.S. 442 (1900); Rogers v. Alabama, 192 U.S. 226 (1904); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958); Arnold v. North Carolina, 376 U.S. 773 (1964); Alexander v. Louisiana, 405 U.S. 625 (1972). See also Rose v. Mitchell, 443 U.S. 545 (1979). In part these holdings rest on the notion that a



discriminatorily selected grand jury must be presumed to have treated a member of the excluded race unfairly, and in part on the notion that the only effective means of eradicating racial discrimination in grand jury selection rests in permitting defendants to challenge it.

This Court has also consistently recognized that a conviction is void under the Equal Protection Clause if the prosecutor deliberately charged the defendant on account of his race. See United States v. Batchelder, 442 U.S. 114, 125 & n.9 (1979); Vasquez v. Hillery, *supra*, 474 U.S. 254, 264. See also Oyler v. Boles, 368 U.S. 448, 456 (1962) (Equal Protection Clause prohibits selective enforcement based upon an unjustifiable standard such as race, religion, or other arbitrary classification).

Similarly, an indictment returned by the grand jury because of the defendant's race is not valid. When race is a "motivating factor"

in the grand jury decision, its indictment cannot stand. Cf. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 274 (1977).

To be sure, there are costs associated with inquiry into the motives or actions of the grand jury or its members. Cf. Wayte v. United States, 470 U.S. 598, 607-09 (1985) (inquiry into prosecutor's decision to prosecute). But, where evidence of bigotry or bias exists, there are costs associated with refusal to inquire, as well. While the bias of individual grand jurors or an individual grand jury may not implicate the "structural integrity," Vasquez v. Hillery, supra, 474 U.S. at 263, of the grand jury in precisely the same way that discrimination in the selection of the grand jury does, the basic integrity of the grand jury process is nonetheless compromised -- and the governmental authorities fully implicated -- where, as here, the grand jurors made bigoted

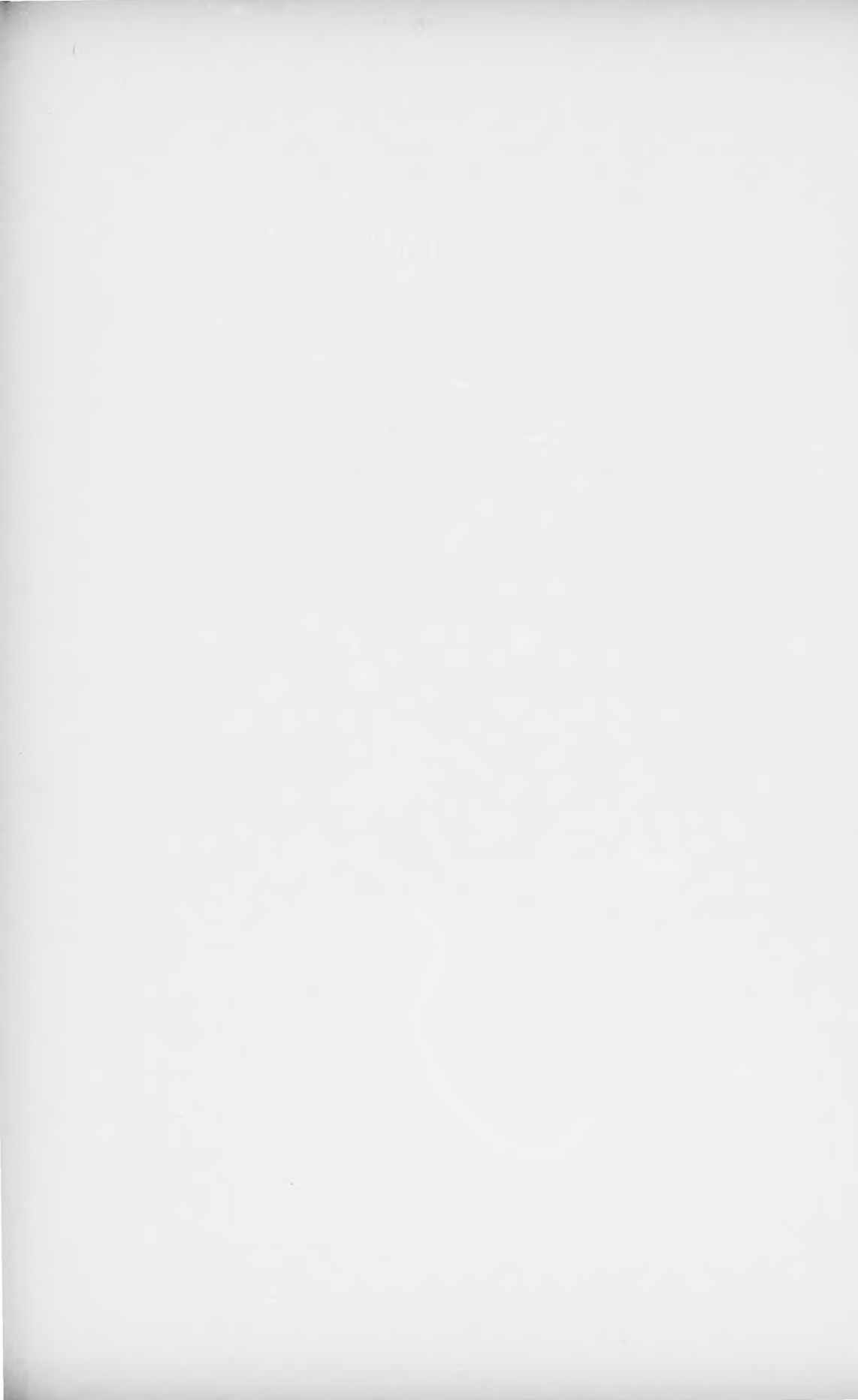


comments, and the prosecutors, at best, failed to caution the jurors against acting on the basis of racial prejudice, and, at worst, joined in the expression of race hatred. If other societal interests suggest that inquiry into grand jurors' motives must be avoided, then that inquiry can be bypassed. Indictments like Petitioner's should be dismissed without further examination of what went on in the grand jury, simply on the basis of the sad record which presently exists.



III. THE COURT OF APPEALS' CONCLUSION THAT THE ISSUE WHETHER A VETERANS ADMINISTRATION FEE APPRAISER IS A PUBLIC OFFICIAL FOR PURPOSES OF THE BRIBERY STATUTE, 18 U.S.C. §201(a), IS AN ISSUE OF LAW TO BE DECIDED BY THE COURT VIOLATES PETITIONER'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO HAVE EACH ESSENTIAL ELEMENT OF A CRIMINAL OFFENSE DECIDED BY A JURY

Petitioner joins the argument made in the separate petition filed on behalf of Steven F. Madeoy and Jakey Madeoy.



CONCLUSION

For the reasons stated, Petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

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Of Counsel
Victoria B. Eiger

Dated: December 28, 1990
New York, New York

A P P E N D I X

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 22, 1989

Decided August 10, 1990

Nos. 87-3085, 87-3086, 87-3088

UNITED STATES OF AMERICA

v.

STEVEN F. MADEOY, *et al.*, APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(No. 86-00377-01)

James Hamilton, appointed by this Court, with whom *Mary C. Albert* was on the brief, for appellants Steven F. Madeoy and Jakey Madeoy in 87-3085 and 87-3086.

John W. Vardaman, appointed by this Court, with whom *John P. Monahan* was on the brief, for appellant Michael J. Friedman in 87-3088.

Thomas C. Black, Assistant United States Attorney, with whom *Jay B. Stephens*, United States Attorney, and

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.



John R. Fisher, Assistant United States Attorney, were on the brief for appellee in all cases. *Steven C. Tabackman* and *Donald J. Allison*, Assistant United States Attorneys, also entered appearances for appellee.

Before EDWARDS, WILLIAMS, and D. H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge D. H. GINSBURG*.

D. H. GINSBURG, *Circuit Judge*: Appellants Steven Madeoy, Jakey Madeoy, and Michael Friedman were indicted for their participation in a scheme to defraud the Federal Housing Administration. The indictment alleged that the appellants

and others unjustly and illegally [enriched] themselves . . . by receiving money from and on account of FHA-insured loans which were fraudulently obtained as a result of the bribery of public officials and the knowing submission of false, fraudulent, and misleading statements to the FHA and to the [Veterans Administration].

Each of the three appellants was charged with one count of conspiracy (18 U.S.C. § 371), and one count of participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. § 1962(c) (RICO)). Steven Madeoy and Michael Friedman were charged with 14 counts of giving a bribe to Jakey Madeoy, a VA fee appraiser, and he was charged with 14 counts of accepting a bribe (18 U.S.C. § 201(b), (c)). Steven Madeoy and Michael Friedman were charged with 45 counts of making "false, fictitious or fraudulent statements or representations" to the Department of Housing and Urban Development and to the VA (18 U.S.C. § 1001), 12 counts of wire fraud (18 U.S.C. § 1343), and 11 counts of interstate transportation of property obtained by fraud (18 U.S.C. § 2314 (ITPOF)). Jakey Madeoy was also charged with 22 counts of making false statements to the VA (18 U.S.C. § 1001). The indictment sought forfeiture under RICO (18 U.S.C. § 1963(a)(1),



(3)), of various properties allegedly acquired by the defendants through their racketeering activity.

The evidence at trial showed that Steven Madeoy entered into purchase contracts with the owners of 23 properties and then listed those properties for resale with a real estate brokerage. The brokerage found a prospective purchaser for each property and referred him to a mortgage company, which in turn prepared mortgage insurance applications and submitted them to the FHA. In order for the FHA to determine the amount of the loan that it would insure, it required an appraiser to estimate the value of a property; for 22 of the properties, Jakey Madeoy, a VA-approved fee appraiser, performed that function. For each property, he submitted to the VA a Residential Appraisal Report with an inflated appraisal, upon which the VA relied in issuing a Certificate of Reasonable Value. The FHA, in turn, relied upon the Certificate in issuing a conditional insurance commitment for each of the properties.

Following receipt of the FHA's conditional commitment, settlement took place through Michael Friedman's law office, and the mortgage company transferred the loan proceeds to Friedman's escrow account, either by interstate wire or by interstate mail. Friedman then falsified the closing documents in order to indicate that each purchaser had made the required minimum down-payment on the property. He also impermissibly disbursed the loan proceeds to various participants in the scheme. Through the scheme Steven Madeoy received \$199,860 of the loan proceeds; Jakey Madeoy received \$14,042; and Michael Friedman received \$20,696.

The jury returned guilty verdicts against all three appellants. Steven and Jakey Madeoy were each convicted on all counts other than one bribery count and two false statement counts; Michael Friedman was convicted on all counts other than one bribery count. Following a separate deliberation, the jury returned a special verdict requiring each appellant to forfeit various properties pursuant to



the RICO count. The district court sentenced each defendant to a period of incarceration and ordered each to pay a special assessment, make restitution, and, pursuant to the RICO count, forfeit the assets identified by the jury.

The appellants raise numerous challenges to their convictions and to the forfeitures ordered by the district court. After reviewing their principal challenges below, and having considered their other arguments, we conclude that the district court committed no reversible error. We therefore affirm the convictions on all counts.

I. GRAND JURY BIAS

We address first the appellants' claim that their indictment must be dismissed due to racial bias on the part of some members of the grand jury that indicted them. Because we conclude that the appellants waived their claim by failing to file a timely motion to dismiss the indictment under Federal Rule of Criminal Procedure 12(b), and that the district court did not abuse its discretion in declining to grant relief from this waiver under Rule 12(f), we reject the claim without considering its merits.

A. *The Grand Jury Proceedings*

During the two year-long grand jury proceeding, three grand jurors made remarks suggesting that they harbor racial prejudice against white people (such as the appellants). The Assistant U.S. Attorneys (AUSAs) presenting the case to the grand jury failed to caution the jurors that such remarks were inappropriate and that racial prejudice could play no role in their determination of whether to return an indictment; one of the prosecutor's comments could even be interpreted as an endorsement of race prejudice.

The first exchange occurred after the jury learned that most of the people who, at the instance of Steven Madeoy, purchased properties, or in whose names properties were purchased, were black:

FIRST JUROR: But the money ended up in the white people's pocket....

SECOND JUROR: As always.

FIRST JUROR: As always.

AUSA: That's correct. Are there any further questions?

The second exchange, which occurred two months later, involved the deputy foreperson and a black witness:

DEPUTY: You mean to say these people didn't look at this piece of property?

WITNESS: Half of them didn't know. No, they didn't....

DEPUTY: I can't even believe that.

WITNESS: You'd be surprised what people will do for money.

DEPUTY: And you being black all your life and you know that the white man takes you any damn time he can and you don't look to see?

WITNESS: Miss, I'll tell you what — (GENERAL LAUGHTER)

The third incident took place a week after the second:

DEPUTY: I sympathize with you, but I have a question. They're going to get mad with me when I say this.

JUROR: You're probably right.

DEPUTY: You know, we've been — we were born black, you know.

WITNESS: Definitely.

DEPUTY: How could you have trusted them so?

B. *The District Court's Decision*

Four business days after the trial started, the appellants filed a motion to dismiss the indictment due to grand jury racial bias or, alternatively, for a voir dire of



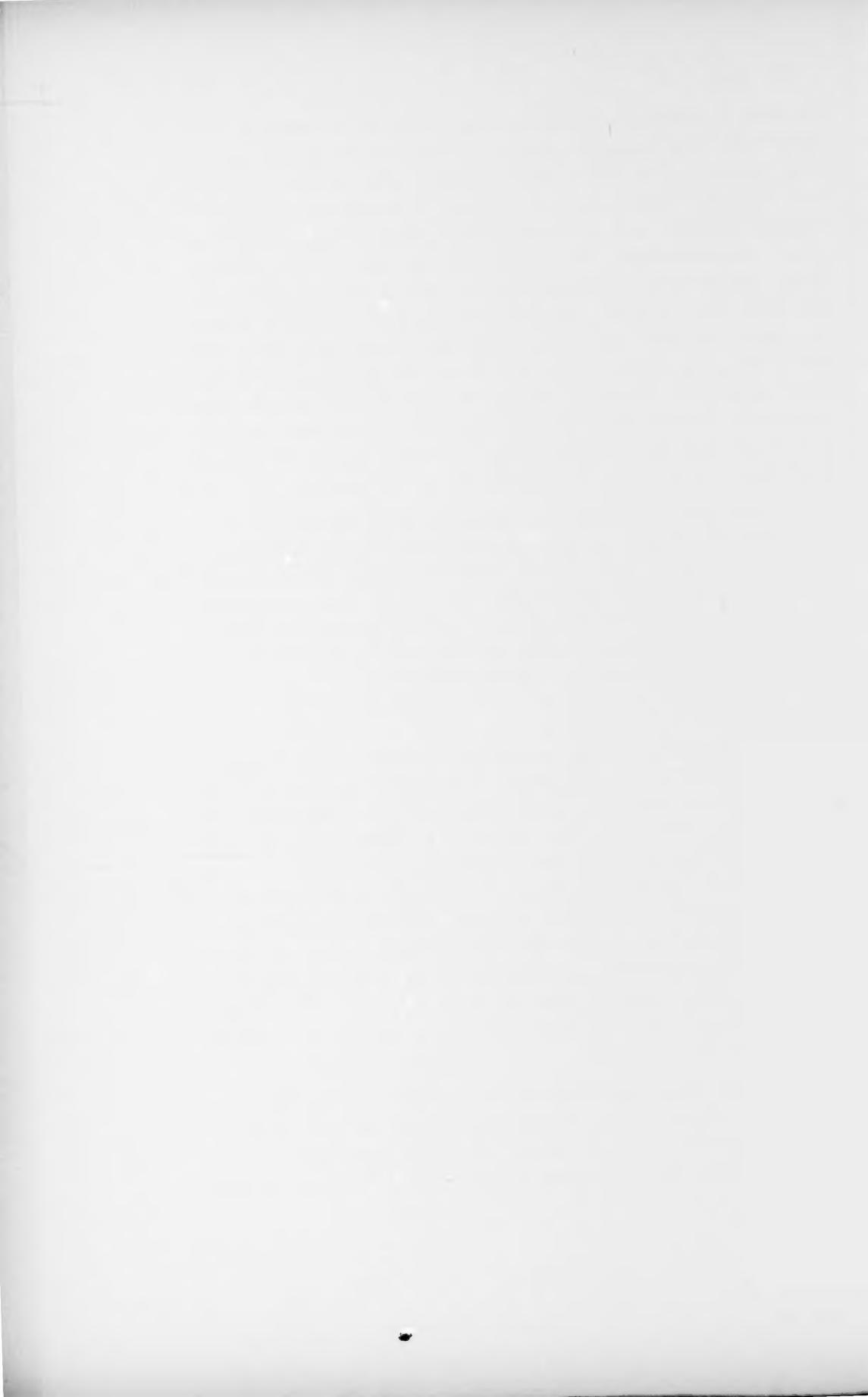
the grand jurors in order for the court to determine "the exact role that racial prejudice played in the return of the Indictment." The court later denied the motion, noting that the defendants filed it "almost a week after the trial began, entirely out of compliance with [Rule 12]." The court acknowledged that "counsel for one of the defendants made oral reference to the grand jury remarks on the first day of trial, just before the voir dire was about to begin." It went on to observe that "that reference was not framed in terms of an attack on the grand jury or the indictment but rather in terms of a proposal for voir dire questions to the petit jury. Thus, the Court had neither a written nor an oral challenge to the indictment before it at that time." The court therefore concluded:

Although categorization of individuals based on their race or color is certainly to be condemned, in the context of facts here the references do not demonstrate such bias by the grand jury as a body that, especially in view of the belated defense effort to raise the issue, either a dismissal of the indictment or a voir dire of last year's grand jury is required.

C. Analysis

The appellants' claim is clearly subject to the requirements of Rule 12: "By its terms, [the Rule] applies to both procedural and constitutional defects in the institution of prosecutions which do not affect the jurisdiction to the trial court." *Davis v. United States*, 411 U.S. 233, 236-37 (1973). Rule 12(b) provides: "Defenses and objections based on defects in the indictment or information" "must be raised prior to trial." Per Rule 12(f), "Failure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver."

We agree with the district court that the appellants' failure to object to the indictment prior to trial constituted a waiver of their claim of grand jury bias. Even assuming that Rule 12 does not require a "writing or for-



mally denominated" motion, *United States v. Oaks*, 508 F.2d 1403, 1404-05 (9th Cir. 1974), the appellants failed to comply with the substance of the rule. Our review of the relevant portions of the transcript leaves no doubt that, although the grand jurors' apparent bias was discussed briefly just before the trial began, none of the defendants challenged the indictment upon that basis.

We need not decide whether, as the Government maintains, the district court's conclusion that the objection was not raised before trial is subject to review only for clear error. Regardless of how much or little deference we owe to the district court, we could not disagree with its conclusion that, under Rule 12, the appellants waived their objection to the grand jury proceedings.

We turn, therefore, to the question whether the district court, "for cause shown," should have "grant[ed] relief from the waiver," pursuant to Rule 12(f). The decision whether to grant such relief is "within the sound discretion of the trial judge," and "will be disturbed on appeal only for clear abuse of discretion." *United States v. Rodriguez*, 738 F.2d 13, 16 (1st Cir. 1984); see also *Davis*, 411 U.S. at 245.

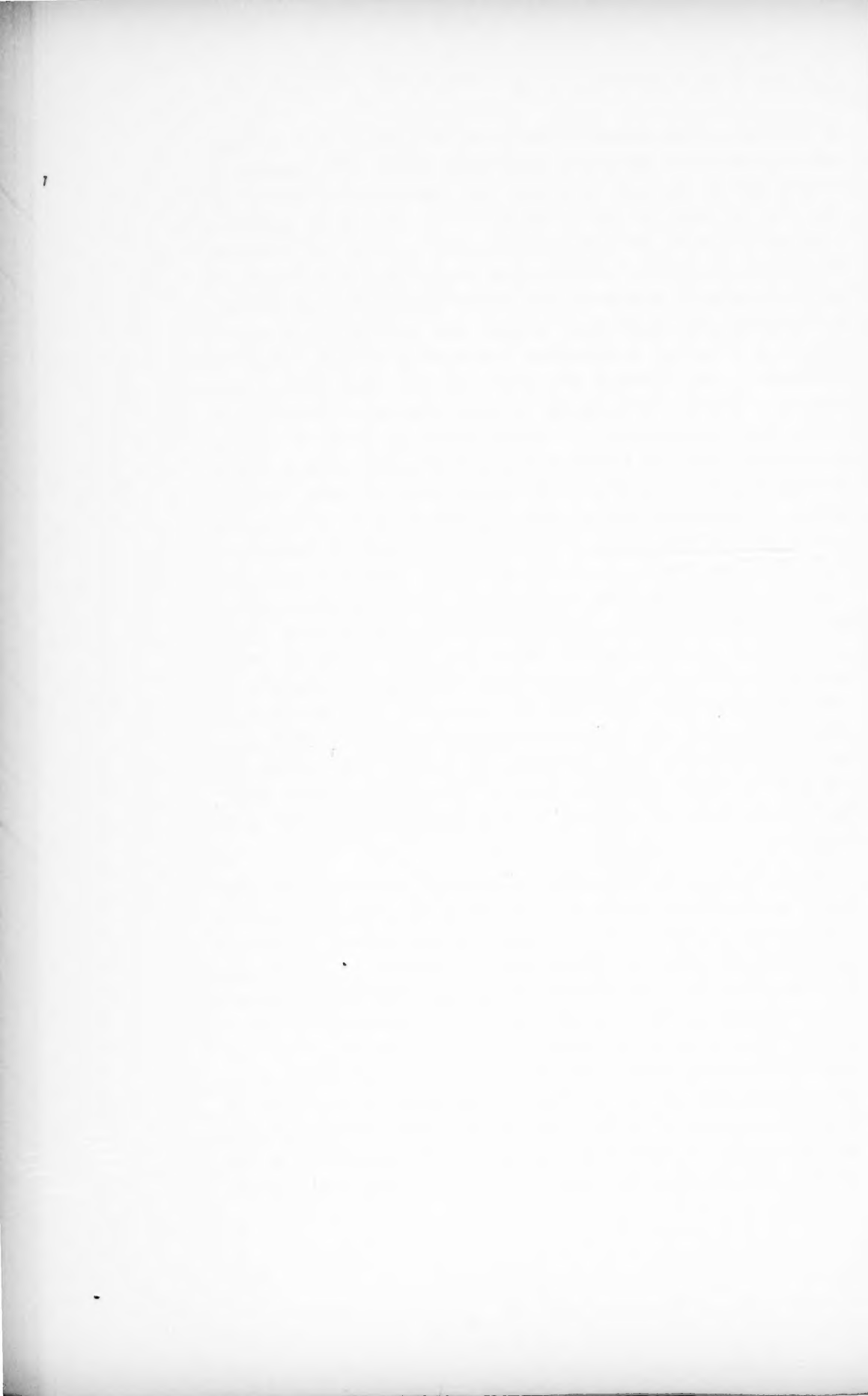
In deciding whether to grant relief from a Rule 12 waiver, a district court should take into account the reason for the defendant's tardiness and whether he has shown that he is actually prejudiced by the defect in the indictment of which he complains. See *id.* at 243-45; *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 361-63 (1963). The Supreme Court has left open whether the defendant must always show both excuse for his non-compliance with Rule 12(b) and actual prejudice, or whether a court should somehow balance these factors in deciding whether the defendant has shown "cause" for relief from waiver under Rule 12. *Murray v. Carrier*, 477 U.S. 478, 494 (1986). Since we are not persuaded by the appellants' arguments with respect to either prejudice or excuse, however, we need not resolve that issue today.

By way of excuse, the appellants argue that they had at most ten days in which to sift through a large amount



of Jencks Act material. (During the ten days prior to trial, the Government gave the appellants about 2000 pages, in installments, the last of which was apparently received on the Friday before the Tuesday when the trial started.) The problem of dealing with a large volume of material in a short period of time before a complex trial begins is not uncommon, however. We must therefore look skeptically upon the appellants' claim, lest the pressure inherent in a criminal proceeding becomes a tool by which a defendant can disrupt his trial. As the Supreme Court stated in *Davis*, "If defendants were allowed to flout [Rule 12's] time limitations, . . . there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim . . ." 411 U.S. at 241. A defendant who receives Jencks Act material only after his trial has begun, and is thus first apprised of the facts upon which his motion to dismiss the indictment is based, may be in a position to argue good cause for his failure to have moved for dismissal prior to trial. The appellants in this case, however, not only had the material, but had concededly discovered the offensive comments before trial, notwithstanding the time pressure during the preceding ten days; that time pressure cannot, therefore, excuse their failure to make a motion on the morning that the trial began.

With respect to prejudice, the appellants contend that they do not have to show actual prejudice because, under *Vasquez v. Hillery*, 474 U.S. 254, 260-64 (1986), prejudice is presumed when a defendant is indicted by a racially biased grand jury. In *Hillery*, racial bias had been a factor in determining the composition of the grand jury. Even if the presumption of prejudice in a compositional case would otherwise carry over to one in which a constitutionally composed jury is marred by exposure to the racially biased remarks of a few individual grand jurors, *Hillery* is inapposite to this case for the simple reason that the motion to dismiss the indictment in *Hillery* was timely-



filed. As the Supreme Court stated in *Davis*, "The presumption of prejudice which supports the existence of the right [to a constitutionally-composed grand jury] is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner." *Davis*, 411 U.S. at 245. *Davis* thus strongly suggests that relief from a Rule 12(b)(2) waiver is indicated only upon the defendant's showing actual prejudice.

The appellants have made no showing of actual prejudice. They point to three isolated remarks made in the course of two years of hearings — hardly enough to make it likely that, but for the remarks, the grand jury would not have indicted them on the same counts.

Because we find that the appellants have shown neither cause for the untimeliness of their motion, nor actual prejudice from its denial, we conclude that the district court did not abuse its discretion in refusing to relieve them from their waiver of the right to challenge their indictment. We therefore do not reach the merits of the appellants' constitutional claim.

We pause, however, to make clear that, despite our determination that the appellants have failed to show actual prejudice, we in no way condone the racial bias revealed in the comments made during the grand jury proceedings. We are troubled not only by the grand jurors' remarks, but more so by the failure of the AUSAs who were present to admonish the speakers and to make clear that any biases that they harbor must play no role in the matter at hand. Such official complacency, perhaps even opportunism, when racial bias infiltrates the criminal justice system, is not tolerable. While the appellants appear not to have been victimized by it, the public suffers whenever the appearance of racial bias goes uncorrected in the courthouse.

II. THE WIRE FRAUD AND ITPOF INSTRUCTIONS

The appellants contend that their wire fraud and ITPOF convictions must be overturned because the dis-



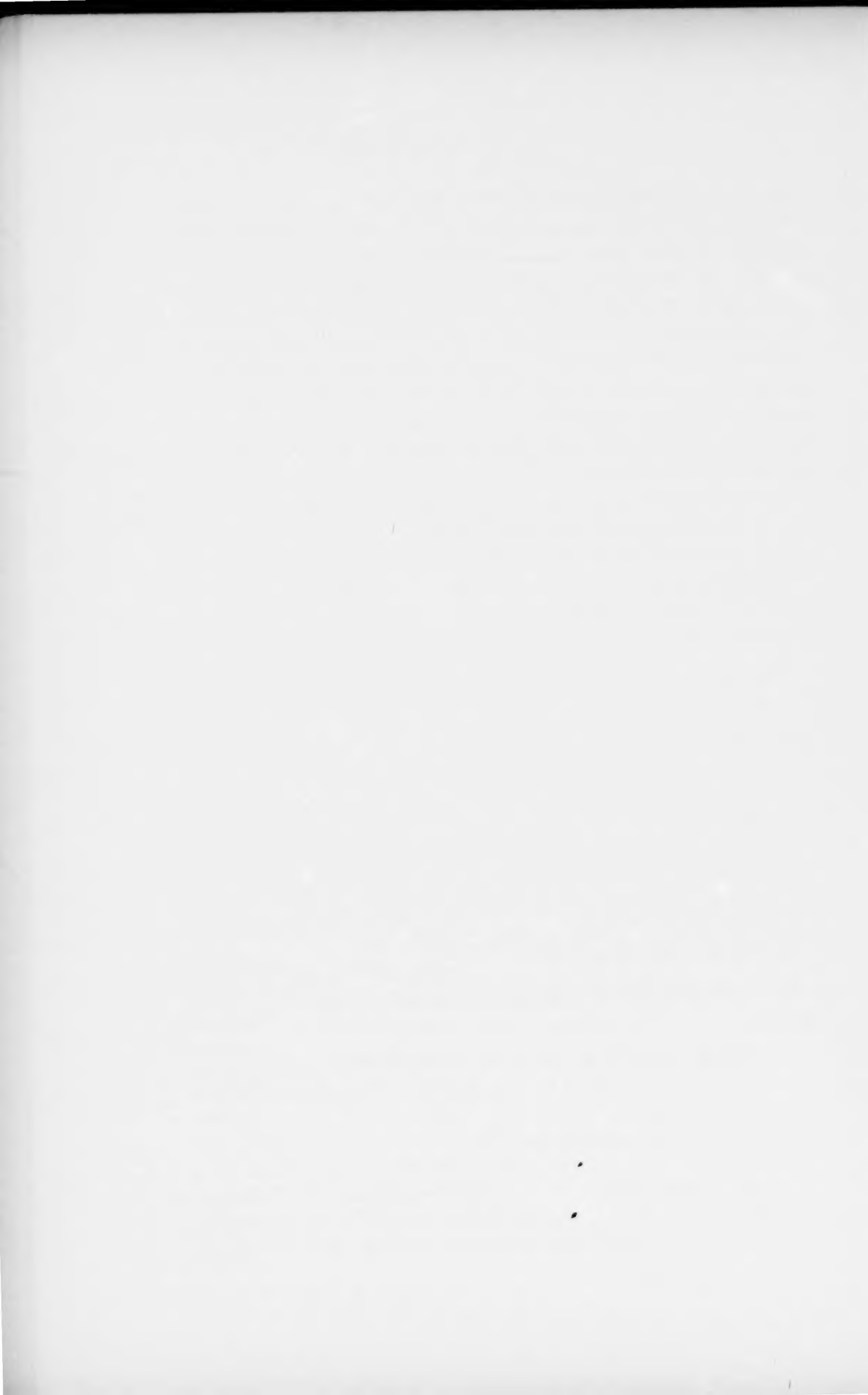
strict court's instructions allowed the jury to convict them for defrauding the Government of "intangible rights," and without finding that the Government was defrauded of money or property, contrary to the Supreme Court's teaching in *McNally v. United States*, 483 U.S. 350 (1987). We reject this claim because we find that, as a whole, the indictment, the evidence, and the jury instructions leave no doubt that the defendants were convicted upon the basis of a proper legal theory. In light of this conclusion, we need not and do not decide whether *McNally* applies to an ITPOF offense. (We note that *McNally* has been overruled by legislation. In November 1988, after the events giving rise to the appellants' convictions, the Congress amended the wire fraud statute to provide that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.)

The wire fraud and ITPOF counts of the indictment charged Steven Madeoy and Michael Friedman with devising

a scheme and artifice to defraud the FHA and the VA of their lawful right to conduct their business and affairs free from deceit, fraud, misrepresentation, and theft and to defraud and obtain money and property from the FHA by means of false and fraudulent pretenses, representations, and promises which defendants well knew were false when made (Emphasis added.)

The district court instructed the jury regarding these counts:

With respect to the first element, the Government must prove beyond a reasonable doubt the existence of a scheme or artifice to defraud, with the objective *either* of defrauding the FHA or the VA of their lawful right to conduct their business and affairs free from deceit, fraud, or misrepresentation, *or* of obtaining money and property from the FHA by means of false and fraudulent representations and promises



which the defendant knew to be false. (Emphases added.)

And:

In order to establish a scheme to defraud, the Government is not required to establish that a defendant himself originated the scheme. Nor is it necessary that a defendant realized any gain from the scheme nor that the intended victim suffered any loss as long as you find the existence of a scheme to defraud.

The wire fraud statute does not prohibit a person from participating in a scheme that is aimed solely at defrauding "the citizens and government . . . of certain 'intangible rights,' such as the right to have the [Government's] affairs conducted honestly." *McNally*, 483 U.S. at 352 (interpreting mail fraud statute); see *Carpenter v. United States*, 484 U.S. 19, 25-28 (1987) (extending *McNally* to wire fraud statute). The statute does, however, protect intangible property, as well as the right to decide how to use that property — even if a defendant's actions do not cause the property owner any monetary loss. *Id.*

We reject the appellants' contention that the indictment did not charge a scheme or artifice to defraud a victim of property. An FHA insurance commitment, by which the Government promises to pay the lender if the borrower defaults on the loan, is a "property interest," not an "intangible right" under *McNally* and *Carpenter*, because it involves the Government's "control over how its money [is] spent." *McNally*, 483 U.S. at 360. Moreover, the indictment alleged that the appellants' scheme resulted in the Government's committing itself to pay back certain loans, which it would not otherwise have agreed to do, thereby causing it to lose money; the indictment also alleged that the appellants' object was to reap financial gain from the scheme. The indictment therefore alleged a scheme for which the jury could properly convict them of wire fraud and ITPOF.

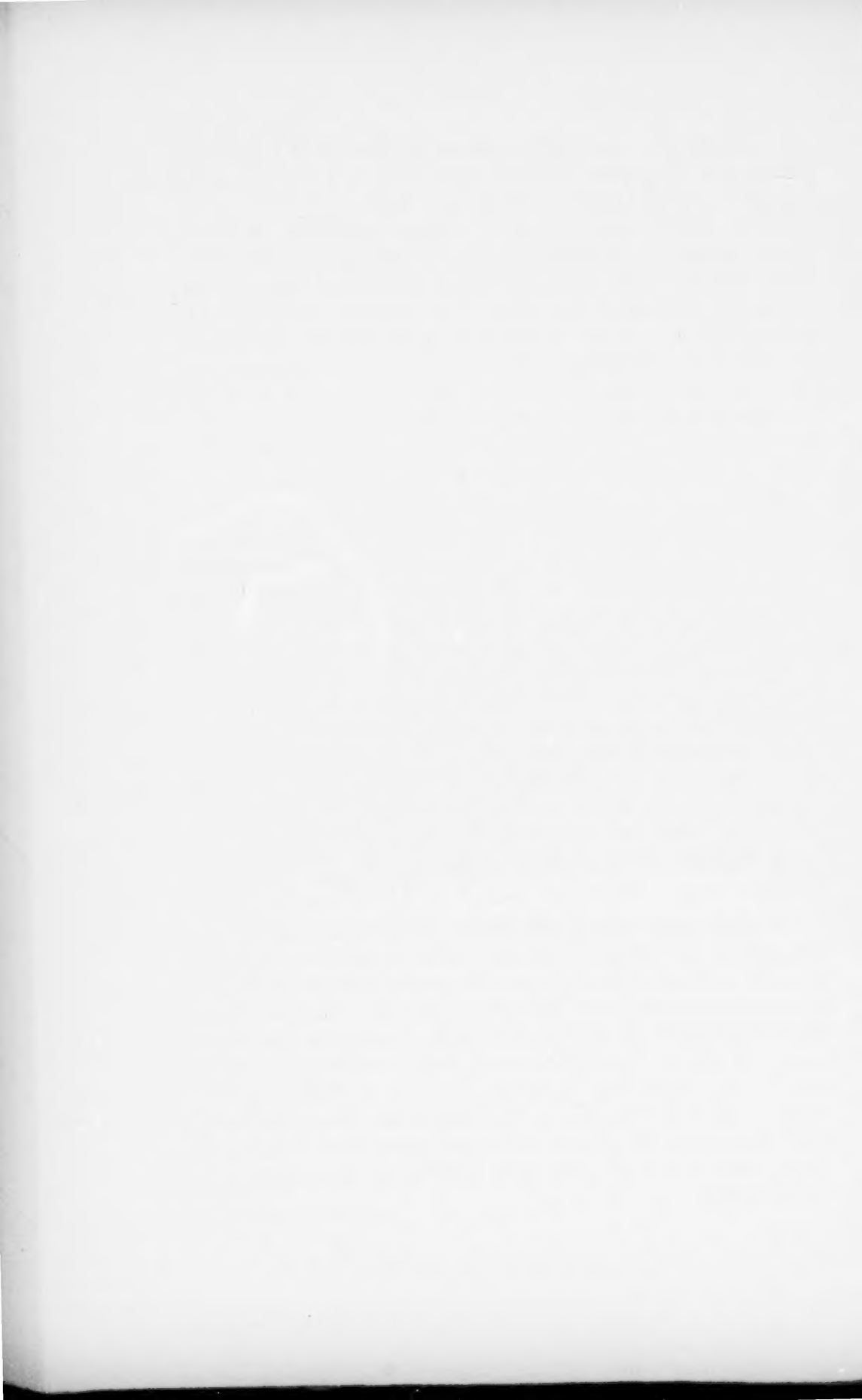
Our decision does not conflict with those of courts that have held that a government's right to issue a license is



not its property. See *United States v. Kato*, 878 F.2d 267, 268-69 (9th Cir. 1989) (FAA's right to issue a private pilot license); *United States v. Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988) (state's right to issue gambling license); *United States v. Murphy*, 836 F.2d 248, 253-54 (6th Cir. 1988) (state's right to issue bingo license). Under those decisions, wrongful issuance of a license infringes an intangible interest in responsible government, and thus conviction for bringing about such issuance is impermissible under *McNally*. In contrast, the FHA's commitment to guarantee a loan is a significant liability to the Government and the commitments obtained by the appellants have, in fact, cost the Government money.

We reject also the appellants' claim that the jury instruction on the wire fraud and ITPOF counts requires reversal of their convictions. The appellants did not object to the instructions at trial, and they are consequently barred from challenging them here except for "plain errors or defects affecting substantial rights," under Rule 52(b). See *United States v. Debang*, 780 F.2d 81, 84 (D.C. Cir. 1986). In this context, they would have to show either that an error in the charge was so substantial that, despite all of the instructions, arguments, and evidence properly before the jury, "it affects the very integrity of the trial process," *United States v. Blackwell*, 694 F.2d 1325, 1341 (D.C. Cir. 1982), or "indicates that a serious injustice was done," *United States v. Baker*, 693 F.2d 183, 187 (D.C. Cir. 1982).

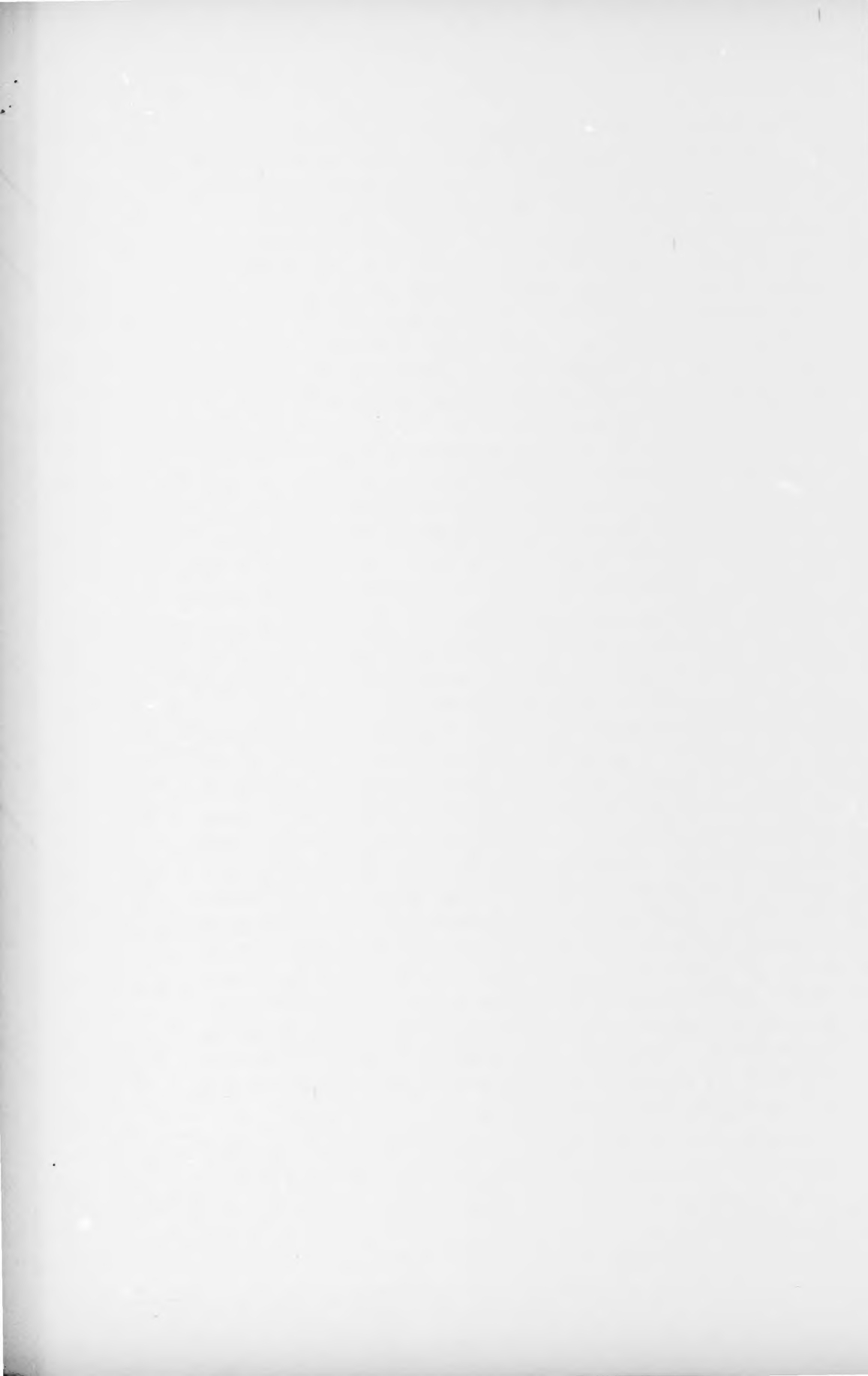
We may assume that the disjunctive in the trial court's instruction to the jury was incorrect in light of *McNally*, because it suggested that the jury could still convict even if it concluded that the defendants sought *only* to defraud the Government of its "lawful right to conduct [its] business and affairs free from deceit, fraud, or misrepresentation." This does not, however, amount to "plain error"; considered together, the jury instructions, the indictment, and the evidence compel the conclusion that the appellants were not convicted upon the basis of an improper legal theory.



The instructions as a whole fairly informed the jury that, in order to convict, it had to find more than a scheme to defraud the FHA of the right to conduct its business free from deceit. For example, immediately following the erroneous instruction, the court explained that "[a] scheme or artifice includes any plan or course of action to deceive others and to obtain money or property from persons so deceived by false and fraudulent pretenses, representations or promises." The court also told the jury that the alleged scheme related to the issuance of Certificates of Reasonable Value, which were used by the Government to decide whether and for how much to guarantee the loans for the 23 properties, and that in order to find the intent needed to convict, it had to conclude that the appellants "act[ed] knowingly and with the specific intent to deceive for the purpose of either causing some financial loss to another or bringing about a financial gain to [themselves]."

These instructions, along with the jury's conclusion beyond a reasonable doubt that the appellants engaged in the conspiracy with which they were charged, makes it simply impossible to imagine how the jury could have concluded that the scheme was not directed at defrauding the Government of a property interest. Thus, *United States v. Slay*, 858 F.2d 1310, 1314-17 (8th Cir. 1988), and *United States v. Ochs*, 842 F.2d 515, 521-24 (1st Cir. 1988), upon which the appellants rely, are not on point; in those cases the defendants could have committed all of the acts alleged and yet not have defrauded anyone of property. The only possible theory upon which the jury could have returned the guilty verdicts in this case is that the appellants participated in a scheme fraudulently to obtain FHA-insured loans, to their financial benefit or the Government's financial loss. Inasmuch as this theory involves fraudulently obtaining a "property interest" under *McNally*, we conclude that the erroneous instruction did not constitute plain error.

Contrary to the appellants' separate assertion, the district court was not required to instruct the jury that it



must find that the Government actually lost any money as a result of the appellants' scheme. In *Carpenter*, a newspaper lost the exclusive ability to decide how to use its confidential information; that was sufficient, although no financial loss was involved, to satisfy the property requirement. 484 U.S. at 27-28. There is no logical way to interpret the guilty verdicts here other than indicating that the jury concluded that the Government lost the ability to identify and avoid unworthy loan guarantee applications — something at least as substantial as the property in *Carpenter* — and of course it also lost money once the borrowers started defaulting.

Because we conclude that the Government properly alleged violations of the wire fraud and ITPOF statutes, and that the district court's instructions did not constitute plain error, we affirm the convictions on those counts.

III. "PUBLIC OFFICIAL" UNDER THE BRIBERY STATUTE

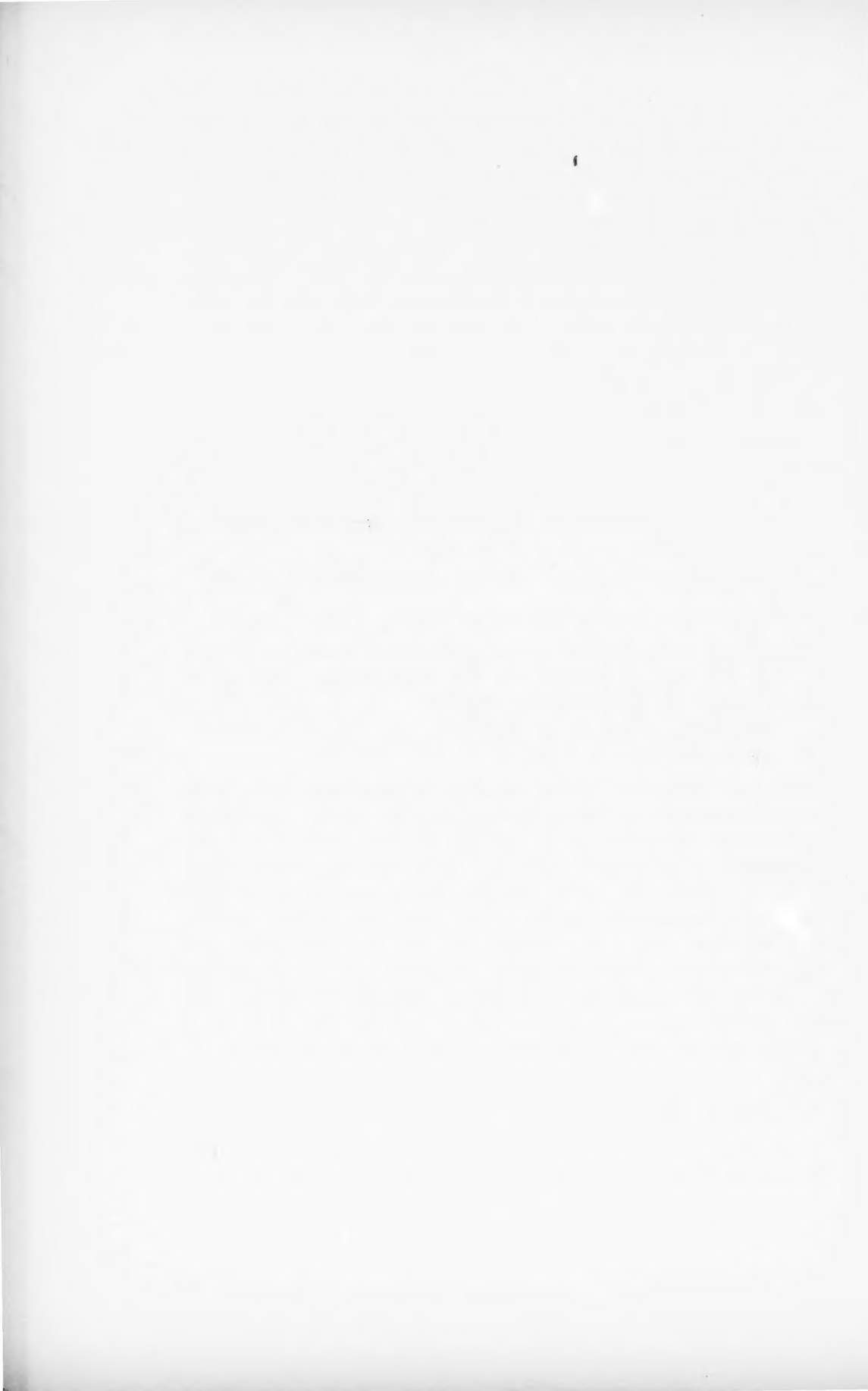
The bribery statute defines a "public official" as an

officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof . . . , in any official function, under or by authority of any such department, agency, or branch of Government.

18 U.S.C. § 201(a)(1). The appellants challenge their bribery convictions on the ground that the court improperly instructed the jury, as a matter of law, that a VA fee appraiser is a "public official," thus denying them their right to have the jury resolve every question of fact beyond a reasonable doubt. They also argue that, pursuant to the rule of lenity, we should interpret the assertedly ambiguous language of the statute to mean that a VA fee appraiser is not a public official. We agree with the district court, however, that a VA fee appraiser is a public official under the bribery statute, as a matter of law.

A. *Fact or Law*

In *Dixson v. United States*, 465 U.S. 482, 484 (1984), the Supreme Court held that, for purposes of the federal brib-



ery statute, the "officers of a private, nonprofit corporation administering and expending federal community development block grants are 'public officials.'" The appellants assert that, because the district court in *Dixon* had submitted this issue to the jury, it must be a question of fact and not of law.

Nothing in the Supreme Court's decision in *Dixon* remotely supports this reasoning. The Court did not address the procedure used by the district court, and it never referred to the jury's determination or suggested that it was reviewing the "evidence" for the proposition that the defendants were public officials. On the contrary, the Court reached its conclusion through an exercise in statutory interpretation, which conclusively shows that this is not a question for the jury. For example, it considered the nature of the defendants' positions in relation to Congress's intent, as evidenced by the legislative history of the federal bribery statute. *Id.* at 496-98. Therefore, we hold that whether an individual is a public official within the meaning of the statute is a question of law, and as such, a matter for judicial resolution, see *Caldwell v. United States*, 218 F.2d 370, 372 (D.C. Cir. 1954).

B. *Fee Appraisers as Public Officials*

In *Dixon* the Supreme Court interpreted the term "public official" to mean a person who "occupies a position of public trust with official federal responsibilities." 465 U.S. at 496. The Court made clear, however, that "employment by the United States or some other similarly formal contractual or agency bond is not a prerequisite" to an individual's being a public official. *Id.* at 498.

A VA fee appraiser falls within both the plain language, and the Supreme Court's interpretation, of the bribery statute. In the Court's terms, he has "official federal responsibilities": it is upon his recommendation, subject to minimal review, that the Government guarantees a loan. And his is a "position of public trust": a fee appraiser must certify that he knows the applicable regulations and must promise not to accept any assignment

for which he has a conflict of interest or to take any payment other than the appraiser's fee set by the Government. Jakey Madeoy, as a VA fee appraiser, was therefore a "person acting for or on behalf of [an] agency . . . in [an] official function, under or by authority of any such . . . agency," *i.e.*, a "public official." 18 U.S.C. § 201(a)(1).

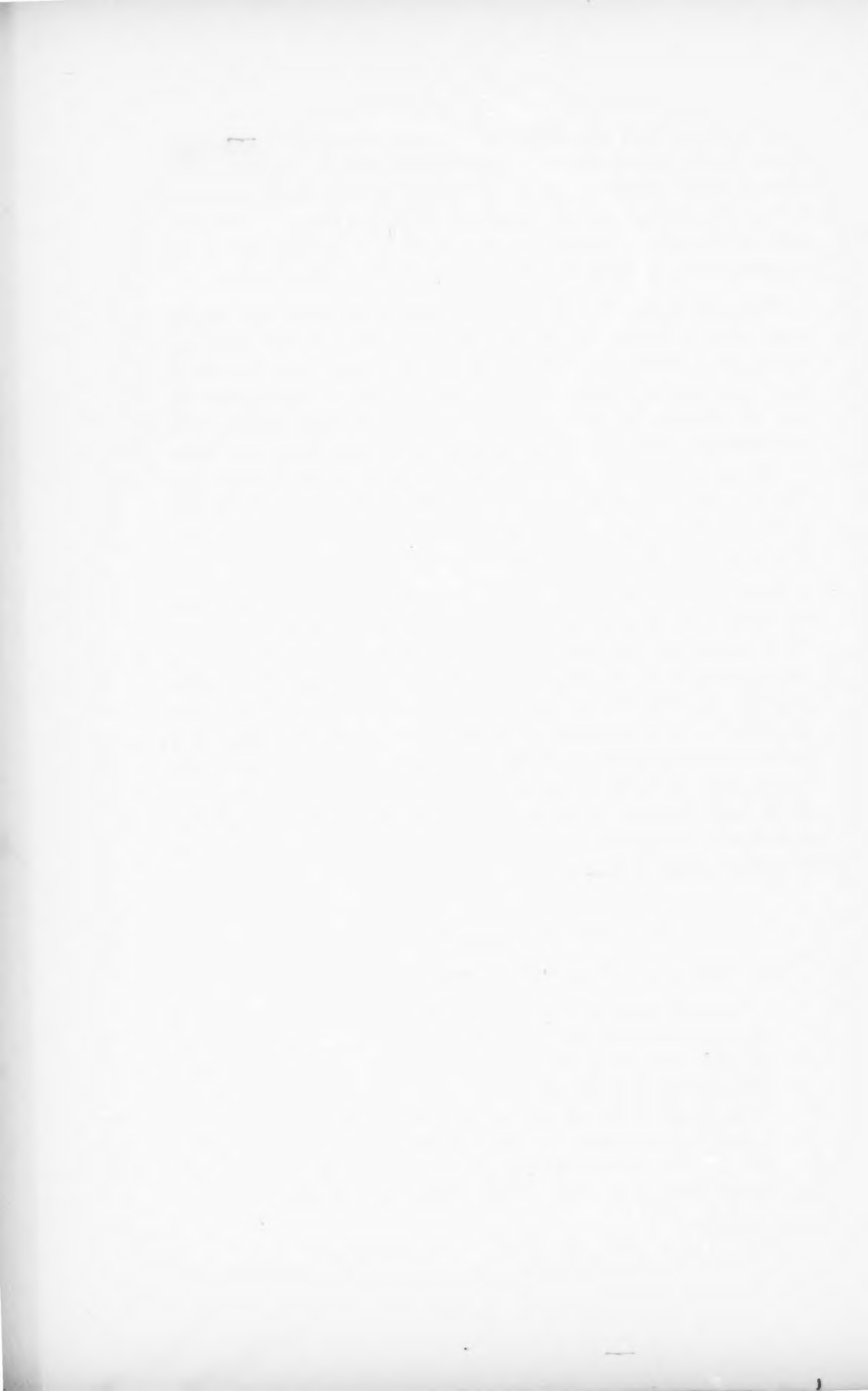
The regulation to which the appellants refer us, which says that a fee appraiser is not an agent of the Government, 38 C.F.R. § 36.4301, has no bearing upon our decision; no one is trying to attribute to the Government an act of Jakey Madeoy as its agent. In any event, the Supreme Court's conclusion that a person does not have to be in a contractual or agency relationship with the Government in order to be a public official, *Dixson* 465 U.S. at 498, makes the regulation irrelevant to our interpretation of the bribery statute.

Finally, the decision that we reach today does not implicate the rule of lenity. The appellants have presented no reason, and we see none, why the statute is any more ambiguous with respect to a VA fee appraiser than with respect to the corporate officers in *Dixson*, where the Supreme Court expressly found that because Congress's intent was sufficiently clear, there was "no need to resort to the rule of lenity." *Id.* at 500 n.19. Accordingly, we conclude that the statute brings a VA fee appraiser within the definition of "public official" clearly enough that the rule of lenity does not apply.

IV. THE FORFEITURE VERDICTS

The trial court charged the jury:

If, and only if, you should find any one or more of the defendants guilty of RICO, should you [sic] list on the verdict form, in the space provided, the numbers of all the racketeering acts that you have unanimously agreed that particular defendant committed in reaching the verdict. You are not required to consider all of the racketeering acts but you may consider more than two and, if you wish, all of them.



The jury listed on the verdict form racketeering acts relating to only 11 of the 23 properties. The appellants therefore asked the court to instruct the jury that it could order forfeiture of the proceeds relating only to those 11 properties. The court refused, and the jury's special verdict required the appellants to forfeit amounts equal to the proceeds that the appellants acknowledged deriving from all 23 properties.

The appellants claim that their forfeitures should be reduced to reflect only the proceeds from the 11 properties that the jury identified on the verdict form. Contrary to the appellants' assertion, however, the scope of their RICO enterprise is not necessarily limited to the 11 properties that the jury specifically indicated in its substantive RICO verdict. The district court correctly instructed the jury that it could convict the appellants under RICO without considering whether they committed every predicate act. The jury did undoubtedly conclude, however, that the appellants committed racketeering acts relating to all 23 properties; this is the only inference we can draw from its reaching a guilty verdict on at least one substantive count relating to each property and in light of the district court's instruction. We therefore uphold the decision to order forfeiture of the proceeds from all of the properties.

We also reject Friedman's separate challenge to the verdict insofar as it requires him to forfeit some of the proceeds from the sale of a property known as the "Monroe Street Joint Venture." The only connection between the Monroe Street property and this case is that Friedman made a down payment on that property with two \$5,000 checks drawn on an escrow account in which, from time to time, he deposited illicit proceeds from his racketeering activities; it was not one of the 23 properties acquired as part of the defendants' illegal scheme. The Government nevertheless sought forfeiture of all of the assets derived from proceeds of the sale of the Monroe Street property on the grounds that they constitute an "interest ... acquired or maintained in violation of [RICO]," 18 U.S.C. § 1963(a)(1), and that they are



"property constituting, or derived from, any proceeds . . . obtained, directly or indirectly, from racketeering activity," *id.* § 1963(a)(3). The jury's verdict required the forfeiture of some, but not all, of the identified assets meeting one of these statutory criteria.

Friedman attacks the forfeiture verdict on two grounds, both of which go, at bottom, to the sufficiency of the evidence. First, he asserts that the \$10,000 that he invested in the Monroe Street property could not have been the proceeds of his racketeering activity because, at the time the checks were drawn, the escrow account had a negative balance. The apparent lack of funds in the account at the moments that the checks were written is not dispositive, however. There was evidence that Friedman deposited illicit proceeds of his racketeering activities into the account six days after the first check was written, and before it cleared the bank. The jury could rationally conclude, therefore, that Friedman used the illicit proceeds that he deposited into the escrow account to cover the two \$5,000 checks, and therefore that Friedman used racketeering proceeds to acquire the Monroe Street property.

Friedman's second argument is that the jury had no legal basis for "bifurcating" the assets derived from the Monroe Street property, *i.e.*, for ordering forfeiture of only some of those assets. We note first that, since Friedman used RICO proceeds to pay for only part of the Monroe Street property, it is not irrational for the jury to conclude that only part of the funds derived from the sale of that property trace to the illicit source of the purchase money. In any event, it is well-settled that a court should not upset a jury's verdict merely because it may be inconsistent. *United States v. Powell*, 469 U.S. 57 (1984). We see no reason why that rule should not apply as well in the context of a verdict of forfeiture; nor have other courts, *see, e.g., United States v. Williams*, 809 F.2d 1072, 1097 (5th Cir. 1987).

V. CONCLUSION

We have considered the other issues raised by the appellants, and we conclude that none requires discussion.



The appellants' convictions and sentences are therefore
in all respects

Affirmed.



UNITED STATES OF AMERICA)
) Criminal No. 86-0377
 v.)
) FILED
 STEVEN F. MADEOY) JUL 17 1987
 JAEY MADEOY) Clerk, U.S. MICHAEL
 J. FRIEDMAN) District Court
 - - - - - District of Columbia

Steven F. Madeoy, Jakey Madeoy, and Michael J. Friedman were convicted after a forty-day jury trial of a total of 174 counts of conspiracy, Racketeer Influenced and Corrupt Organizations Act (RICO), bribery, false statements, wire fraud, and interstate transportation of property obtained by fraud.¹ Pending before the Court are a number of post-trial motions.

Grand Jury

The defendants have moved pursuant to

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Rule 12(b), Fed. R. Crim. P., for a dismissal of the indictment, or for a voir dire of the grand jury, on the basis that the grand jury was motivated by racial prejudice. It appears from the grand jury transcript that one member of that body stated in the course of the proceedings, commenting upon evidence that two white co-defendants² of these defendants had used (presumably black) members of the community to bring in primarily black prospective purchasers of the real estate in question, but that the money "as always" ended up in "white peoples' pocket." Another grand juror stated that a black purchaser of the properties in question should have inspected these properties prior to purchase because "You know the white man takes you any damn time he can and you don't look to see?" Notwithstanding these remarks, there is no

²These two individuals were not tried with these defendants but pleaded guilty. The three defendants subscribing to the motion are also white.



basis for the relief defendants seek, for several reasons.

First. Rule 12(b)(2) requires that unless objections based on defects in the indictment are raised by motion made prior to trial, they are deemed waived. Francis v. Henderson, 425 U.S. 536 (1976). While this requirement may be dispensed with for "cause shown," actual prejudice is normally required in that event, Davis v. United States, 411 U.S. 233, 245 (1973) -- something defendants are clearly unable to do here.

The requirement of a pretrial motion is not a mere wooden command without substantial basis in reason or policy. As the Supreme Court said in Davis, supra, if the time limits of the Rule are followed,

inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the

other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial.

The motion in this case was not filed until almost a week after a trial began, entirely out of compliance with the Rule and after jeopardy had attached. To be sure, counsel for one of the defendants made oral reference³ to the grand jury remarks on the first day of trial, just before the voir dire was about to begin. But that reference was not framed in terms of an attack on the grand jury or the indictment but rather in terms of a proposal for voir dire questions to the petit jury. Thus, the Court had neither a written nor an oral challenge to the indictment before it at that time.⁴

³No motion was presented at that time, either orally or in writing.

⁴'Responsive to defendants' request, the Court did immediately voir dire the petit jury panel with regard to racial bias, with negative results. Defendants do not claim



Moreover, counsel's reference at that time, in addition to not complying with the letter of the Rule, also contravened its spirit since an inquiry at that late juncture would have unnecessarily caused a substantial disruption.⁵ Although defendants imply that they lacked an earlier opportunity to raise the issue, the fact is that the government turned over the grand jury transcript to them at least ten days prior to the trial -- ample time within which to raise the issue properly.

Second. As noted above, the petit jury was subjected to a voir dire with regard to racial bias and none was found. If there was racial prejudice in the grand jury room its

that any racial problem existed with respect to the petit jury.

⁵Judging from their present papers, the defendants would have had the Court at that time conduct a voir dire of the grand jurors who presumably had by then dispersed. Accordingly, the trial would have had to be postponed although all the government's many witnesses were present or on immediate call as were a substantial number of members of the jury panel for the month in connection with the jury selection that was about to begin.



effect was overcome when the presumably unbiased petit jury unanimously returned the verdict against the defendants that it did.

Third. Defendants do not rely -- they cannot rely -- on Rule 6(b), Fed. R. Crim. P., which permits grand jury challenges only where the grand jury was not selected or drawn in accordance with the law or when an individual grand juror was not legally qualified. Accordingly, defendants base their claim on the Due Process Clause of the Fifth Amendment. The Court does not doubt that due process protects a criminal defendant from an indictment that is plainly the product of racial prejudice.⁶ But that is not this case. Two jurors made remarks about co-defendants of these movants in the course of a long, drawn-out grand jury investigation, indicating that money from the transactions in question ended

⁶But see Beck v. United States, 369 U.S. 541 (1962); Estes v. United States, 335 F.2d 609, 613 (5th Cir.), reh'g denied, 353 F.2d 283 (1966); United States v. Knowles, 147 F.Supp. 19 (D.D.C. 1957).

up in the pockets of white individuals.⁷ Although categorization of individuals based on their race or color is certainly to be condemned, in the context of facts here the references do not demonstrate such bias by the grand jury⁸ as a body that, especially in view of the belated defense effort to raise the issue, either a dismissal of the indictment or a voir dire of last year's grand jury is required.

* * *

[Remainder of opinion not reproduced.]

⁷That assessment, insofar as the evidence shows, was not wide off the mark.

⁸According to 4 Barron, Federal Practice and Procedure §1892 at 44, Congress expected grand juries to be "scrupulously fair, but not necessarily uninformed or impartial."

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-3085

SEPTEMBER TERM, 1989
D.C. Crim. No. 86-0377-01

United States of America

v.

Steven F. Madeoy, et al.,
Appellants

United States
Court of Appeals
For The
District of
Columbia Circuit
Filed Aug 10
1990
Constance L.
Dupre, Clerk

and Consolidated Case Nos: 87-3086, 87-3088

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Edwards, Williams and D.H. Ginsburg,
Circuit Judges

J U D G M E N T

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgments of the District Court appealed from in these causes are hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE,
CLERK

Date: August 10, 1990

Opinion for the Court filed by Circuit Judge
D.H. Ginsburg

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-3085

SEPTEMBER TERM, 1990

CR 86-00377-01

86-00377-02

86-00377-03

United States of America

v.

Steven F. Madeoy,

Appellant

United States
Court of Appeals

For The

District of
Columbia Circuit

Filed Oct 16
1990

Constance L.

Dupre

Clerk

and Consolidated Case Nos: 87-3086, 87-3088

BEFORE: Edwards, Williams and D.H. Ginsburg,
Circuit Judges

O R D E R

Upon consideration of appellants'
petition for rehearing, it is

ORDERED, by the Court, that the petitions
are denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE,
CLERK

BY:

Linda E. Jones
Deputy Clerk

JAN 2 1991

U.S. DEPT. OF JUSTICE
CLERK

In The
Supreme Court of the United States

October Term, 1990

HAROLD FRIEDMAN
and
ANTHONY HUGHES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**Appendix to
Petition for Writ of Certiorari**

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No. 89-3494/3504

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

ORDER

v.

**HAROLD FRIEDMAN and
ANTHONY HUGHES,**
Defendants-Appellants

**BEFORE: KEITH and NORRIS, Circuit Judges; and DUG-
GAN*, United States District Judge.**

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

* Hon. Patrick J. Duggan sitting by designation from the Eastern District of Michigan

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The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green, Clerk

Leonard Green, Clerk

ENTERED: 9/10/90

NOT FOR PUBLICATION

89-3494

89-3504

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific citations.
Please see Rule 24 before citing in a proceeding in a court
in the Sixth Circuit. If cited, a copy must be served on other
parties and the Court.

This notice is to be *prominently* displayed if this decision is
reproduced.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

v.

HAROLD FRIEDMAN,
ANTHONY HUGHES,

Defendants-Appellants.

ON APPEAL FROM
THE UNITED
STATES DISTRICT
COURT FOR THE
NORTHERN
DISTRICT OF
OHIO.

BEFORE: KEITH and NORRIS, Circuit Judges; and DUG-
GAN, District Judge.*

PER CURIAM: Harold Friedman ("Friedman") and Anthony Hughes ("Hughes") appeal from their respective May 30, 1989 judgment and conviction orders. Following a jury trial, Friedman and Hughes were convicted of: participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §1962(c); conspiring to do so, in violation of 18 U.S.C. §1962(d); and unlawfully embezzling union funds, in

* The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

violation of 29 U.S.C. §501(c). In addition, Friedman was convicted of making a false statement to the United States Department of Labor, in violation of 29 U.S.C. §439(b).

Friedman was sentenced to four years of probation, fined \$35,000 and ordered to forfeit his positions as officer and trustee of Local 507 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local 19 of the Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO. Hughes was sentenced to four years of probation, fined \$30,000 and ordered to forfeit his positions with Local 507 and Local 19.

Having carefully considered the record and the arguments presented in the briefs and orally, we find no error warranting reversal. Therefore, we AFFIRM the judgment and conviction orders of the Honorable George W. White, United States District Judge for the Northern District of Ohio, for the reasons set forth in his May 13, 1988, June 21, 1988, and May 5, 1989 Memorandum Opinions and Orders.

ENTERED: 7/26/90

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

vs.

JACKIE PRESSER, et al,

Defendants

CASE NO. CR86-114

HON. GEORGE W.
WHITE

MEMORANDUM
AND ORDER

This matter is before the Court pursuant to defendants' motion to reconsider this Court's order of February 11, 1988, wherein this Court denied defendant's motion to compel discovery of certain documents, particularly those referred to as the "10,000 documents" and the "prosecutive memoranda". The government opposes reconsideration, arguing such issues have already been exhaustively briefed and ruled upon.

The "10,000 documents" — The motion for reconsideration is granted. The underlying motion to amend this Court's prior order, however, is denied on the merits.

Although not specifically stated in Rules of the United States District Court, Northern District of Ohio (hereinafter "Local Rules"), precedent, as well as common sense, require that a motion for reconsideration of a previous court order be based on new evidence, new legal authority, or some other factor causing a change in circumstances from those existing at the time of the original order. See, Fed.R.Civ.P., Rule 59(a),(2),(e); 27 Fed. Proc., L.Ed. §62:372 (local rules may provide that a motion to reconsider, or a motion similar to one previously denied, be based on changed circumstances).

Defendants herein proffer the affidavit of William Beyer in support of their motion to reconsider. This can be properly considered as new evidence in support of the motion to reconsider.¹ The Motion to Reconsider is therefore granted.

After reconsideration of defendants' motion to compel discovery, this Court denies the motion on the merits. In support of the motion, defendants contend that based on *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), its progeny and the Beyer affidavit,² this Court must order the production of the "10,000 documents" for an *in camera* Brady³ review. *Agurs* and its progeny set out the rule that (1) where a specific request for *Brady* material is made to the prosecutor and (2) where there existed a substantial basis for the defendant's claim that the information sought was both exculpatory and material, the prosecutor violates his *Brady* duty if he failed to produce the information before trial either to the defendant or to the trial court

¹ Although this affidavit is "new" in the sense that it is being offered to the Court for the first time, there is no indication that it is newly discovered or that it could not have been previously submitted by defendant through the exercise of due diligence. Defendants state that such affidavit would have been proffered at the oral hearings previously held had said hearings not been discontinued. Without addressing defendants' arguments concerning their ability to proffer this affidavit at the hearings and concerning the ending of the hearings, this Court notes that the affidavit certainly could have been proffered with the defendants' original written motion to compel discovery. Defendants' failure to offer this evidence previously is therefore unexplained. In an abundance of caution, however, this Court will allow submission of the affidavit at this time and will entertain the motion to reconsider. It should also be noted that defendants' citation of case authority different from that ruled upon in the original motion does not constitute new legal authority supportive of a motion to reconsider. Said authority was in existence prior to the time the original order denying discovery was rendered and should have been proffered at that time..

² The Beyer affidavit contains the opinion of William Beyer, that, based on his review of the "10,000 documents" said documents are material to the preparation of the authorization defense and could affect the outcome of the Presser trial. Exhibit A, defendants' motion to reconsider, at 2.

³ *Brady v. Maryland*, 373 U.S. 83 (1963).

for review. *U.S. Agurs*, 99 S.Ct. at 1057, *Jones v. Jago*, 575 F.2d 1164, 1168, *cert. denied*, 439 U.S. 883, 99 S.Ct. 223, 58 L.Ed.2d. 196 (1978); *Campbell v. Marshall*, 769 F.2d 314, 318 (6th Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1268, ____ L.Ed.2d ____ (1985).

These cases fail to support the instant defendants' motion as they merely discuss the standards of review to be applied on the post-trial appeal of a *Brady* issue. See *United States v. Presser, et al*, No. 87-3896, slip op. at 12-15 (6th Cir. April 25, 1988). As the courts have consistently stated and as the Sixth Circuit Court of Appeal has again specifically held in a recent related opinion in this very case, "[t]he *Brady* doctrine did not create a constitutional right of pre-trial discovery in a criminal proceeding." *U.S. v. Presser*, slip op. at 19, citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). The remedy for a *Brady* violation is a new trial and that remedy is available only after a first trial has ended in conviction and defendant shows that there is a reasonable probability that had *Brady* evidence been disclosed in time for use at trial, the conviction would not have occurred. *U.S. v. Presser*, slip op. at 22.

Defendants' new facts and argument thus fail to support the amendment of this Court's previous discovery order. The motion to amend is denied.

The "Prosecutive Memoranda" — The motion to reconsider this Court's previous ruling denying discovery of the "Prosecutive Memoranda" is denied. Defendants fail to point to new facts, new legal authority or any other change in circumstance from the time of the original order which would support reconsideration. The motion to reconsider is therefore denied.

Finally, defendants also offer no support for reconsideration of the portion of the original order denying discovery of other types of documents requested therein. As such, the motion for reconsid-

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eration of those portions of the order is also denied.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 5/13/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

vs.

JACKIE PRESSER, et al,

Defendants

CASE NO. CR86-114

HON. GEORGE W.

WHITE

MEMORANDUM

AND ORDER

This matter is before the Court pursuant to the motion of defendants Presser, Hughes and Friedman to dismiss the indictment. Citing Rule 12 of the Federal Rules of Criminal Procedure,¹ (hereinafter "Rule 12(b)"), defendants advance six defenses allegedly supporting a pre-trial hearing and dismissal of the indictment. Of these six defenses, five² are based on the al-

¹ Rule 12 of the Federal Rules of Criminal Procedure provides in pertinent part: "(b) *Pretrial motions* — Any defense ... which is capable of determination without the trial of the general issue may be raised before trial by motion.... (e) *Ruling on Motion*. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue"

² The five defenses are summarized as the following:

- 1) the crimes in question were authorized thus there is no illegality;
- 2) the crimes in question were authorized thus there is no criminal intent;
- 3) the defendants relied on the authorizations therefore to prosecute them for the crimes violates due process;
- 4) the crimes were authorized and the government's conduct in so authorizing was outrageous therefore the indictment should be dismissed; and
- 5) the crimes were authorized and such authorization constitutes government misconduct therefore the indictment should be dismissed pursuant to the court's supervisory powers in order to prevent the court's becoming an accomplice to such misconduct.

leged existence of government authorization for the commission of the crimes charged in the indictment and the sixth³ is based on the theory of collateral estoppel.

A) The Authorization-based defenses — Preliminarily, defendants argue that, pursuant to two particular legal theories (discussed *infra*), the government has the burden to produce, in advance of trial, facts which conflict with those presented in defendant's motion and that the failure to do so requires the granting of defendant's dismissal motion.

The two theories advanced in support of the above-noted pre-trial burden are, first that the cases of *Commonwealth of Kentucky v. Long*, 837 F.2d 727 (6th Cir. 1988) and *State of Connecticut v. Marra*, 528 F.Supp. 381 (D. Conn. 1981), require such a pre-trial hearing and burden when the authorization defense is raised in a pre-trial motion to dismiss; and second, that Rule 12(b) alone requires the pre-trial determination of a dismissal motion based on the authorization defense as such is "capable of determination without trial of the general issue."

The government opposes the motion arguing both that the defenses advanced are not capable of determination without trial and that it, the government, bears no burden to produce, pre-trial, facts disputing those advanced by defendants in the motion to dismiss.

Neither ground advanced by defendants requires a pre-trial hearing and determination of the first five authorization-based defenses advanced by defendants. First, the *Long* and *Marra* cases are not controlling here because the instant case does not

³ The sixth defense is summarized as follows:

1) 6) the government is collaterally estopped from arguing that Allen Friedman was a "no show" employee because the Social Security Administration has previously determined this issue to the contrary. The charges referring to Allen Friedman should therefore be dismissed.

involve the Supremacy Clause of the federal constitution. The holdings in both those cases are inextricably tied to the protection of Supremacy Clause interests. In both cases, a state was attempting to prosecute, within its State Court system, a federal agent or informant for crimes which the federal government admitted it had authorized. The cases were removed to federal court pursuant to a federal statute (28 U.S.C. §1442(a)(1)) specific to such situation.⁴ The federal government defendants then moved for a dismissal pursuant to Rule 12(b) citing the defense of immunity. The courts in each case essentially held that when the Supremacy Clause is raised as a defense by a federal officer charged with a state crime, the court has a duty to make a prompt ruling on that issue. A Rule 12(b) motion is thus appropriate. Additionally, if the state fails to come forward with evidence rebutting the immunity claim of the federal officer and thereby raising issues of fact, the district court should sustain the defense of immunity under the Supremacy Clause. *Commonwealth of Kentucky v. Long*, 837 F.2d at 752; and see *State of Connecticut v. Marra*, 528 F.Supp. at 386-387. In setting out these rules, both courts were attempting to advance the goals of speedy determination of such cases and the prevention of disruption of federal government operations. The holdings in those cases are, therefore, tied to the existence of Supremacy Clause interests.

The instant case clearly does not involve Supremacy Clause interests. Specifically, in the case at bar there is neither a state prosecution of a federal agent nor an admission by the federal government that it authorized the crimes at issue. As such, the holdings of the *Long* and *Marra* cases alone do not mandate the pre-trial hearing and distribution of burden advanced herein by defendants.

⁴ Such statute protects federal agents from prejudice potentially inherent in local, state court prosecutions of federal agents. *Commonwealth of Kentucky v. Long*, 837 F.2d at 750.

The second argument advanced by defendants, i.e., that Rule 12(b) alone requires a pre-trial determination of the validity of these authorization-based defenses, is also not persuasive. As previously noted, a defense may be properly submitted for the determination of its validity in a pre-trial motion pursuant to Rule 12(b) if it is "capable of determination without trial of the general issue". Fed. R. Crim. P., Rule 12(b). In order to meet this standard the defense must raise questions of law rather than fact. *U.S. v. Jones*, 542 F.2d 661, 664-665 (6th Cir. 1976); *Commonwealth of Kentucky v. Long*, 837 F.2d at 750. However, the district court does have the power to make preliminary findings of fact regarding the legal issue raised so long as those findings do not invade the province of the ultimate finder of fact. *U.S. v. Jones*, 542 F.2d at 664-665; *Commonwealth of Kentucky v. Long*, 837 F.2d at 750. A defense is, therefore, "capable of determination" if a trial of the facts surrounding the commission of the alleged defense would be of no assistance in determining the validity of the defense. *Commonwealth of Kentucky v. Long*, 837 F.2d at 750, citing *U.S. v. Jones*, 542 F.2d at 665.

The above-noted standard is clearly not met in the instant case. The first five defenses advanced are all contingent on the existence of government authorization of the crimes charged. The government strenuously denies the existence of such alleged authorizations. Additionally, defendants dispute the contention that the various alleged "ghosts", in fact, failed to perform proper services for the union.

Given these circumstances, a determination of the validity of such authorization defenses will require the consideration of various significant facts. These facts include, *inter alia*, whether "ghosting" was occurring; what statements were made by federal agents which allegedly constituted authorizations for such; whether any such statements were, in fact, ever made; the factual background existing when the defendants hired the alleged

"ghost" employees as regards whether such hirings were based on such authorizations; and, the factual background against which such authorizations were made as regards whether defendants reasonably relied on such authorizations. These factual questions are certainly too far-reaching to constitute mere preliminary findings of fact. To the contrary, these factual questions can be properly decided only upon the trial of all the facts surrounding the commission of the alleged offenses.

For the foregoing reasons, this Court finds that the first five grounds for dismissal advanced in the instant motion are not properly raised in a pretrial motion pursuant to Rule 12(b).¹ The motion for dismissal based on these five grounds is therefore denied.

B.) Collateral Estoppel — As their sixth ground for dismissal, defendants contend that a court has previously determined that Allen Friedman was not a ghost employee, that the government is collaterally estopped from relitigating that issue and that the counts of the instant indictment based thereon (Counts III, V and VII) must now be dismissed as fatally defective. Specifically, defendants state that a hearing was held before Administrative Law Judge Allan P. Ramsey, Jr. in October of 1986 upon the conclusion of which ALJ Ramsey concluded that Allen Friedman was an "employee" of Local 507 during the years 1977-1981 for purposes of Social Security wage-posting regulations. As such, defendants contend, the factual question of whether Friedman was a "ghost" employee has been fully litigated and the government must be collaterally estopped from relitigating said issue.

¹ Given the instant determination that these issues are not properly raised in a Rule 12(b) motion, there is no need to decide the issue of the distribution of evidentiary burdens once such motion is pending.

The government opposes the motion for dismissal based on the collateral estoppel ground, arguing 1) nonmutual collateral estoppel may not be asserted against the government in the instant case; 2) even assuming, *arguendo*, such doctrine could be so asserted, the factual requirements for the use of the doctrine are not satisfied herein. Specifically, as to this second argument the government contends that the issues herein are not identical to those raised and necessarily determined and that it was not a party to the previous action.

It should first be noted that the defense of collateral estoppel is properly raised in the instant pre-trial motion to dismiss pursuant to Rule 12(b). This is clear as such defense involves, primarily, a question of law. Additionally, the facts underlying the claim of previous adjudication are essentially agreed upon by the parties herein.

This Court would also note that it declines to address the issue, raised by the government, of whether nonmutual collateral estoppel may be applied against the federal government. The resolution of this issue is unnecessary as, even assuming, *arguendo*, the doctrine could technically be applied here, collateral estoppel is not appropriate under facts of the instant case. (*See infra*).

The doctrine of collateral estoppel, also referred to as "issue preclusion", prevents the relitigation of a matter after such matter has been previously litigated and a determination and judgment rendered thereon. Issue preclusion is to be applied only where the identical issue sought to be relitigated was actually determined and necessarily decided in a prior proceeding in which the litigant against whom the doctrine is asserted had a full to fair opportunity to litigate the issue. *N.L.R.B. v. Master Slack and/or Master Trousers*, 773 F.2d 77, 81 (6th Cir. 1985); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 649, n.5, 58

L.Ed.2d 552 (1970); *Marlene Industries Corp. v. N.L.R.B.*, 712 F.2d 1011 (6th Cir. 1983).

This Court has carefully reviewed the opinion of ALJ Ramsey, the instant indictment and the instant briefs addressing this issue. Such review compels the conclusion that, for several reasons, the doctrine of collateral estoppel is not applicable to the instant case. First and foremost, the issues herein are not identical to those previously litigated before the administrative law judge. ALJ Ramsey for instance, did not decide whether (1) pursuant to the fiduciary standards imposed by Title 29, United States Code, Section 501, Allen Friedman performed sufficient work to preclude defendants' conviction for violating Title 29, United States Code, Section 501(c), (*See* Indictment, Counts I, II, and III); (2) Allen Friedman performed the services of a "business agent" (*See* Count V); or (3) Allen Friedman performed as a full time employee and worked at least 1000 hours each year (*See* Count VII). Where, as here, the issues raised are not identical, the principles underlying the doctrine of collateral estoppel⁶ do not come into play. As such, application of the doctrine is not appropriate herein.

The above conclusion obviates the need to discuss in detail the remaining reasons for the non-application of the collateral estoppel doctrine. This Court, however, notes, in brief, that it has concluded that the hearing before ALJ Ramsey was not adversarial in nature and that the Department of Justice was not a party to said action. Therefore, even assuming, *arguendo*, the issues were

⁶ The principles underlying the doctrine of collateral estoppel include: the protection of adversaries from the expense and vexation of attending multiple lawsuits; the conservation of judicial resources; and the fostering of reliance on judicial action by minimizing the possibility of inconsistent decisions. *Marlene Industries, Corp. v. N.L.R.B.*, 712 F.2d at 1015.

identical, a full and fair opportunity to previously litigate such before ALJ Ramsey did not occur. Collateral estoppel is thus inappropriate for these additional reasons.

For the foregoing reasons, this Court concludes that the doctrine of collateral estoppel does not bar the instant litigation of the charges against defendants Presser, Hughes and Friedman based on the conduct of Allen Friedman. The motion to dismiss those counts is therefore denied.

For the foregoing reasons the motion to dismiss is denied.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 6/21/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA
Plaintiff

vs.

ANTHONY HUGHES
and
HAROLD FRIEDMAN
Defendants

CASE NO. CR86-114
HON. GEORGE W.
WHITE

MEMORANDUM
AND ORDER

This matter is before the Court pursuant to motions for acquittal (Fed. R. Crim. P. 29(c)) and new trial (Fed. R. Crim. P. 33) filed separately by each defendant. Following jury trial, defendant Friedman was convicted of a substantive Rico¹ charge, conspiracy to violate Rico, embezzlement, and filing false Labor Department documents. Defendant Hughes was convicted of a substantive Rico charge, conspiracy to violate Rico, and embezzlement. In support of his motions, defendant Friedman advances the following grounds:

1) inconsistency of the verdict; 2) the erroneous admission of a statement made by Hughes as violative of defendant Friedman's right to confront witnesses, and 3) as overly prejudicial (Fed. R. Evid. 403); 4) insufficiency of evidence of embezzlement; 5) insufficiency of the evidence to prove the elements of the Rico charges; and 6) constructive amendment of the indictment or fatal variance between the indictment and the evidence. Defendant Hughes advances the following grounds: 1) insufficiency of the evidence to prove the elements of the Rico charges; 2) insuffi-

¹ Racketeer Influenced And Corrupt Organizations Act, 18 U.S.C. 1961.

ciency of the evidence to prove embezzlement, 3) prosecutorial misconduct; 4) inconsistency of the verdict; 5) denial of his request for a severance; and 6) constructive amendment of the indictment or fatal variance.

I. Inconsistency of the Verdict

Both defendants Friedman and Hughes argue that the jury's verdict is inconsistent as the defendants were convicted for acts occurring in certain years (1978 and 1981) but not others; these verdicts are inconsistent, the defendants argue, as the government's evidence failed to differentiate between such years. A review of the record, however, demonstrates that the government did offer evidence and arguments differentiating between said acts and years. Moreover, after a review of the verdict, this Court is satisfied that such bears substantial indicia of consistency.

Finally, assuming, *arguendo*, it could be said that the verdict was internally inconsistent, such is not a valid ground for overturning the verdict. A verdict in a criminal case need not be internally consistent. *United States v. Silva*, 846 F.2d 352, 357-58 (6th Cir), *cert denied*, ____ U.S. ____, 109 S.Ct. 365, 102 L.Ed.2d 354 (1988); and see e.g. *United States v. Powell*, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984). An inconsistent verdict does not show that the jury mistakenly convicted the defendant of any crime. Such verdict may, in fact, show that the jury provided the defendant with a windfall by wrongly failing to convict on some offenses of which the defendant should have been found guilty. *United States v. Silva*, 846 F.2d at 358; and see *United States v. Powell*, 105 S.Ct. at 478. Thus, verdict inconsistency is not a valid ground for the overturning of a jury verdict. The motions of defendants based on this ground are therefore *denied*.

II. The Admission of the Hughes Statement —

Defendant Friedman argues that the admission into evidence of the statement made by codefendant Hughes was erroneous and prejudicial to him, defendant Friedman. Defendant Friedman advances two claims of error in this regard, first, that the admission of such evidence violated his right to confront witnesses against him, and second, that such was more prejudicial than probative thereby violating Rule 403 of the Federal Rules of Evidence.

As to the alleged violation of confrontation rights, defendant Friedman argues that the co-defendant Hughes statement² constituted a confession implicating defendant Friedman and was inadmissible unless co-defendant Hughes made himself available for cross-examination. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 1627-28, 20 L.Ed.2d 476 (1968). Specifically, defendant Friedman argues that *Bruton* was violated as the use of the word "union" in the statement, when combined with other trial evidence and with the argument that defendant Friedman was the head of the union, caused the statement to expressly name and incriminate defendant Friedman. Additionally, defendant Friedman argues that a *Bruton* violation cannot be cured by limiting instructions to the jury on the use of the statement. Defendant cites *Cruz v. New York*, 489 U.S. 186, 107 S.Ct. 1714, 1717, 95 L.Ed.2d 162 (1987) as support for this contention.

² Over the objection of defendant Friedman, Labor Department Special Agent James Thomas testified concerning a conversation which he had with co defendant Hughes in March of 1982. The conversation included an indication that the the Forge Restaurant (owned by defendant Hughes and Mrs. Presser) was being liquidated. When asked what he would be doing after leaving the restaurant, defendant Hughes replied, "I am going back and work for the union". (James Thomas Tr., at 8). This statement was admitted subject to the jury instruction that the jury's use of such statement be limited to defendant Hughes only.

The government opposes this motion arguing that the Hughes statement does not constitute a confession and does not expressly name and incriminate codefendant Friedman. As such, the government argues, no *Bruton* violation occurred.

The law is clear that where two or more defendants are tried jointly, the pretrial confession of one of them which expressly names and implicates another is not admissible against the other unless the confessing defendant waives his Fifth Amendment rights so as to permit cross-examination. *Bruton v. United States*, 88 S.Ct. at 1621-1622. Subsequent Supreme Court decisions confirm that a codefendant's confession must expressly implicate the defendant in order to fall within *Bruton*. *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 1706-1707, 95 L.Ed.2d 176 (1987). Moreover, *Richardson*, expressly rejected the theory that a codefendant's confession not naming and incriminating the defendant could nevertheless violate *Bruton* on the ground that the factual context of the confession might implicate the defendant. *Richardson*, 107 S.Ct. at 1707-1709.

In light of these rules, it is clear that no *Bruton* violation occurred in the instant case. The Hughes statement neither expressly named nor incriminated defendant Friedman. The statement is, in fact, devoid of the indication that anyone else was involved in the scenario. Defendant Friedman's first argument, in fact, amounts to the claim that the factual context, i.e., the combination of the statement with other trial evidence, might satisfy the facial incrimination prong of the *Bruton* test. As noted, this argument was expressly rejected by the Supreme Court in *Richardson*. *Richardson v. Marsh*, 107 S.Ct. at 1707-1709. As the instant statement did not expressly name and incriminate defend-

ant Friedman, no *Bruton* violation occurred.³ The statement was properly admitted subject to the limiting instruction.

III. The Rule 403 Argument

As previously noted, defendant Friedman also argues that the Hughes statement was inadmissible under Rule 403 of the Federal Rules of Evidence. In this regard, defendant Friedman argues 1) that no balancing of the Rule 403 factors by this Court appears on the record, 2) that the balancing, if done, should concern the probative value versus prejudicial effects as to defendant Friedman only, and 3) that, even assuming that "cross-defendant" balancing is proper, the prejudicial effect on defendant Friedman far outweighed the probative effect as to codefendant Hughes.

The government responds that the probative value as to codefendant Hughes far outweighed any prejudicial effect on defendant Friedman. Also in this regard, the government argues that no prejudice in fact, inured to defendant Friedman as the jury was specifically instructed not to consider the Hughes statement in regard to defendant Friedman. Finally, the government contends that appropriate balancing did occur as each side entered its arguments regarding admission onto the record and the Court immediately ruled thereon. The government also notes that this Court is free to expand on its balancing analysis at this time.

Rule 403 of the Federal Rules of Evidence provides that, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Fed.

³ Given this conclusion, defendant Friedman's citation of the *Cruz* decision is unpersuasive. The *Cruz* Court ruled that, a limiting instruction is no remedy where the codefendant's confession was facially incriminating of another defendant, and where said other defendant also confessed, *Cruz v. New York*, 107 S.Ct. at 1719. As no facial incrimination exists in the instant case, the *Cruz* case is unpersuasive.

R. Evid. 403. This admissibility determination is placed within the sound discretion of the trial judge. Only if the probative value of the evidence is *substantially* outweighed by its prejudicial character is the evidence inadmissible. *United States v. Zipkin*, 729 F.2d 384, 389 (6th Cir. 1984) (emphasis original) (citations omitted). In balancing probative value and prejudicial effect, the court must look at the evidence in the light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect. *Id.* The impact that such evidence may have against a codefendant is a factor to be considered in the balancing process. *United States v. Kane*, 726 F.2d 344, 350 (7th Cir. 1984); and see *United States v. Wellington*, 754 F.2d 1457, 1466 (9th Cir.), *cert. denied*, 474 U.S. 1032, 106 S.Ct. 592, 593, 88 L.Ed.2d 573 (1985).

A hearing was held in the instant case on November 22, and 23, 1988 to determine the admissibility of the Hughes statement. During that hearing, both defendant Friedman and the government presented their arguments on the 403 issue to the Court. (Excerpt Tr. of November 23, and 24, 1988 at 21-29). This Court then ruled. The reasons for such ruling are clear from the record. The Hughes statement was highly probative of the guilt of defendant Hughes. There was no showing that any potential prejudicial effect upon codefendant Friedman substantially outweighed such probative effect as to defendant Hughes, particularly in light of the instruction that was to be given to the jury limiting the jury's application of such evidence to defendant Hughes. As such, this Court found the statement admissible.

In the instant post-judgment motion, defendant Friedman offers no evidence to support his current claim that the jury disregarded this Court's limiting instruction. Given that the Hughes statement neither referred to codefendant Friedman by name, nor even alluded to the existence of a third person, the statement was not so inflammatory or prejudicial as to present the danger that

the jury would disregard this Court's limiting instruction. *United States v. Kane*, 726 F.2d at 350. It may be presumed then, that the jury followed its instructions. *United States v. Zalman*, Slip. Op. No. 87-61 78/6183, at 11-12 (6th Cir., filed February 23, 1989). The Hughes statement was properly admitted. Defendant Friedman's motion for new trial on this ground is *denied*.

IV. Insufficiency of Evidence

Defendants Friedman and Hughes argue that the government presented insufficient evidence on Counts I, II, and IV to prove that the payments to Hughes in 1978 and 1981 constituted embezzlements, and presented insufficient evidence on Counts I and II to establish either an "enterprise" or a "pattern of racketeering activity". Additionally, defendant Friedman argues that the "no work" language of the instant indictment constituted an additional element for counts I and II and that insufficient evidence was presented to prove this "no work" element. Finally, defendant Friedman contends that insufficient evidence was presented to allow conviction on Count VI (false statements on the LM-2 Labor Department Report).

The circumstances under which a trial court may take a case from a jury are very narrow:

Evidence may be held insufficient, therefore warranting taking the case from the jury, only if the government's case lacks evidence in support of one or more elements of the offense charged.

United States v. Adamo, 742 F.2d 927, 935 (6th Cir.) *cert. denied*, 469 U.S. 1193, 105 S.Ct. 971, 83 L.Ed.2d 975 (1985). Evidence on a particular element is sufficient if a reasonable mind might accept it as adequate to support a conclusion or if it affords a substantial basis of fact from which a fact in issue can be inferred. *United States v. Green*, 548 F.2d 1261, 1266 (6th Cir. 1977).

In determining the question of sufficiency, the evidence must be considered in the light most favorable to the government. *Adamo*, 742 F.2d at 932. The government is entitled to the benefit of all inferences which can reasonably be drawn from the evidence, even if the evidence is circumstantial. *Adamo*, 742 F.2d at 932. The government's evidence need not exclude every reasonable hypothesis except that of guilt. *Adamo*, 742 F.2d at 932.

Moreover, in deciding a Rule 29 motion, a district court may neither weight conflicting evidence nor consider the credibility of the witnesses. *Adamo*, 742 F.2d at 935. In this regard, the Sixth Circuit has explicitly stated:

There is no place ... for arguments regarding a government witness's lack of credibility in a Rule 29 motion for acquittal before a federal trial judge.

Id. at 934-35. Further, the Sixth Circuit has previously stated that no quantity of contradictory evidence will authorize a trial court to direct a verdict if there is sufficient evidence to take the case to the jury. *Ross v. United States*, 197 F.2d 660, 665 (6th Cir.), *cert. denied*, 344 U.S. 832, 73 S.Ct. 40, 97 L.Ed.2d 648 (1952). For a district court in a Rule 29 context to weigh conflicting evidence or to assess the credibility of witnesses would usurp the jury's role as sole finder of fact in a criminal trial. *Adamo*, 742 F.2d at 935.

Finally, as the Sixth Circuit has emphasized within the last few months, the granting of a motion of acquittal will be confined to cases where the prosecution's failure is clear. *United States v. Overmyer*, Slip. Op. No. 87-3488, at 4 (6th Cir., filed February 10, 1989). The above-noted rules apply to Rule 29 motions for judgment of acquittal after the jury has returned its verdict. *Overmyer*, No. 87-3488, at 4.

This Court has reviewed the arguments presented on this issue and, applying the aforementioned principles, concludes that sufficient evidence was presented on the elements of each count to

justify the submission of this case to the jury.¹ At most, conflicting evidence was presented as to certain elements. The determination of such conflicts, however, is precisely the function allocated to the jury in our system of justice. This case was properly submitted to the jury for decision. The motions for acquittal of defendants Hughes and Friedman on this ground are, therefore, *denied*.

V. Prosecutorial Misconduct

Defendant Hughes next contends that a new trial should be granted him because the government, in its opening statement, mentioned that the testimony of FBI Agent Frederick concerning an alleged conspiracy to stop the instant indictment, would be produced to prove Hughes' consciousness of guilt. Defendant Hughes argues that 1) this statement was made by the government in bad faith as the government knew it would have only a slim chance of producing such evidence and 2) this statement was prejudicial. Thus, defendant Hughes argues that this constituted prosecutorial misconduct and that Rule 33 of the Federal Rules of Criminal Procedure requires that, pursuant to the interests of justice, a new trial should be granted.

No prosecutorial misconduct occurred in this regard. First, defendant Hughes has produced no evidence that the prosecution believed it unlikely that it would be able to produce such evidence. In fact, the record supports the contrary conclusion. Pursuant to the government's motions, Agent Frederick was granted immunity from prosecution in exchange for his testimony. When Agent Frederick persisted in his refusal to testify, the government offered the agent's sworn written statements into evidence. Finally, the government forcefully and successfully argued to reverse this Court's initial decision to grant Agent Frederick's bail pending appeal of his contempt citation (for failure to testify) and contin-

¹ As discussed *infra*, this Court has concluded that the "no work" language of the indictment does not constitute an additional element of the Rico charge.

ued such argument when Agent Frederick challenged the no-bail ruling before the Court of Appeals. Given these facts, it cannot be said that the government, in bad faith, made mention of such evidence in its opening statements.

Additionally, this Court ruled, prior to Agent Frederick's taking the stand, that such evidence would be admissible in the instant trial on the issue of consciousness of guilt. As such evidence would have been admissible, defendant Hughes was not prejudiced by its mention during opening statement. *United States v. Woods*, 613 F.2d 629, 635 (6th Cir.), *cert. denied*, 446 U.S. 920, 100 S.Ct. 1856, 64 L.Ed.2d 275 (1980); and *see Willis v. Kemp*, 838 F.2d 1510, 1521 (11th Cir.), *cert. denied*, ____ U.S. ____, 109 S.Ct. 1328, 103 L.Ed.2d 546 (1989). Finally, regarding prejudice, reference to Agent Frederick's testimony was never made to the jury after opening statements, and the jury was clearly instructed that counsel's opening statements and arguments were not evidence. As such, no prejudice inured to defendant Hughes as a result of this portion of the opening statement.

As neither bad faith nor prejudice existed, no prosecutorial misconduct can be said to occurred. Defendant Hughes' motion for new trial on this ground is, therefore, *denied*.

VI. Severance

Defendant Hughes contends that he was erroneously denied a severance of his trial from that of codefendant Friedman. Defendant Hughes argues he was prejudiced by such denial as defendant Hughes presented defenses conflicting with those of codefendant Friedman, i.e., that the Hughes statement to Agent Thomas did not constitute an admission of guilt, and that defendant Hughes "worked" (as opposed to codefendant Friedman's claim that Hughes did not work but that codefendant Friedman was "authorized" to pay him.).

Assuming, *arguendo*, defendant Hughes did make and was denied a severance motion, he has not met his burden of proving that such denial was erroneous. The law is clear that the presentation of different defenses by codefendants does not require a severance of their trials. *United States v. Benton*, 852 F.2d 1456, 1469 (6th Cir.), *cert denied*, ___ U.S. ___, 109 S.Ct. 555, 102 L.Ed.2d 582 (1988). As a general rule, in conspiracy cases, persons jointly indicated should be tried together. This is particularly true where the offenses charged may be established against all of the defendants by the same evidence. *United States v. Zalman*, Slip Op. No. 87-6178/6183, at 11 (6th Cir., filed February 23, 1989). To prevail on a motion to sever, the defendant must show that the antagonism between the codefendants will mislead or confuse the jury. The defendant carries the heavy burden of making a strong showing of factually specific and compelling prejudice resulting from a joint trial. In meeting this heavy burden, the defendant must demonstrate the jury's inability to distinguish the evidence relevant to each defendant. Even where defendant can show some potential jury confusion, such confusion must be balanced against society's interest in speedy and efficient trials. *United States v. Benton*, 852 F.2d at 1469.

The facts of the instant case do not support defendant Hughes' claims of antagonistic defenses. First, defendant Hughes' current interpretation of his statement to Agent Thomas was never presented to the jury. Second, codefendant Friedman relied on the same defense at trial as did defendant Hughes, i.e., that all of the alleged ghost employees actually worked. Codefendant Friedman simply did not use the "authorization" defense. As such, no conflicting defenses were presented to the jury.

Defendant Hughes, has therefore, failed to meet his burden of establishing prejudice resulting from any denial of a severance motion. His motion for new trial on this ground is, therefore, *denied*.

VII. Constructive Amendment of the Indictment

Both defendants Friedman and Hughes move for a new trial, arguing that the instant indictment was constructively amended by certain evidence and jury instructions presented during trial. In the alternative, defendants argue that a fatal variance occurred between the facts alleged in the indictment and those proved at trial. The government opposes the motions, arguing that there was no amendment of an element of the charges and thus, no constructive amendment of the indictment. The government also argues that there was no variance between facts alleged in the indictment and proof at trial, but, assuming, *arguendo*, such variance did occur it was non prejudicial as defendants had sufficient notice of such to avoid surprise at trial.

Due process requirements demand that a conviction be based on the charge originally alleged in the indictment. *Cole v. Arkansas*, 333 U.S. 196, 68 S.Ct. 514, ____ L.Ed. ____ (1948). Thus, a defendant may not be tried on charges not set forth in the indictment. *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960). After an indictment has been returned, its charges may not be broadened through amendment except by the grand jury itself. *United States v. Zelinka*, 862 F.2d 92, 96 (6th Cir. 1988), citing *Stirone v. United States*, 80 S.Ct. at 272-73. There are three possible types of variations between a grand jury indictment and evidence presented at trial. The least common is an actual amendment. This occurs when the charging terms of the indictment are literally altered. The second type, a constructive amendment, occurs when the terms of an indictment are, in effect, altered by the presentation of evidence and jury instructions which so modify the essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment. The third type of variation, and the most common, is a variance. This occurs when the charging terms remain unchanged but evi-

dence at trial proves facts materially different from those alleged in the indictment. *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986); *United States v. Zelinka*, 862 F.2d at 97.

Amendments, constructive or actual, are held to be prejudicial per se. Variances are subject to the harmless error rule. These types of variances will be found to be harmless unless the defendant can show that his substantial rights are affected. This occurs only when the defendant can show prejudice to his ability to defend at trial, to the general fairness of the trial, or to the indictment's sufficiency to bar subsequent prosecutions. *United States v. Hathaway*, 798 F.2d at 911. A variance will become a constructive amendment where it is such as to create a substantial likelihood that a defendant may have been convicted on an offense other than that charged. The prejudice per se rule applies to this situation. *United States v. Hathaway*, 798 F.2d at 911; *United States v. Zelinka*, 862 F.2d at 97.

The purposes underlying the rule against amendments include (1) notice to the defendant of the charges he will face at trial; (2) notice to the court so that it may determine if the alleged facts are sufficient in law to support a conviction; (3) prevention of further prosecution for the same offense; and (4) the assurance that a group of citizens independent of prosecutors or law enforcement officials have reviewed the allegations and determined that the case is worthy of being presented to a jury. *United States v. Zelinka*, 862 F.2d at 97.

The fundamental question to be resolved in the instant case is whether the language of the indictment so defined counts I, II, and VI as to contain, as an element, the "no work" theory. The instant indictment charged that both the substantive Rico count (Count I) and the conspiracy to commit Rico count (Count II) were based upon embezzlement of union funds as prohibited by 29 U.S.C. § 501(c). The essential elements of a 501(c) type embezzlement are, *inter alia*, that the defendants, with the intent to de-

fraud the unions and without good faith belief that the expenditures were for the legitimate benefit of the unions, converted the union money to their own use. *United States v. Bane*, 583 F.2d 832, 835-36 (6th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979). The 501(c) embezzlement theory was charged in each predicate act of counts I and II. In addition, the government specifically alleged in its "Manner and Means" section of counts I and II that the defendant paid union money to the subject employees "knowing full well that [the employees] failed to perform work on behalf of Local 507" and "when, in fact, [the employees were] not performing the services and duties of business agent[s]." As to count VI, the false labor reports charge, the indictment specifically charged that defendant Hughes was paid a "salary" as a "business agent" when defendant Friedman knew defendant Hughes was not "performing the services and duties of a business agent."⁵

To begin, a fair reading of the language at issue does not mandate the conclusion that the ghosts are alleged to have performed absolutely "no work". The word "work" and the phrase "not performing the services..." can just as reasonably be read as alleging that the employees did not work in a general sense. This reading of the language includes both an insufficient work theory and a no work theory. Given this construction of the language of the indictment, neither a constructive amendment nor variance can be said to have occurred by reason of the introduction of certain evidence and instructions at the instant trial. The motions of defendant can be denied on this basis alone.

Assuming, *arguendo*, the indictment language did amount to an absolute "no work" allegation, such allegation did not pertain to an element of the charges and, as such, no constructive amendment occurred as a result of the presentation of certain trial evi-

⁵ This Court finds that the constructive amendment argument does not apply to the convictions of defendants for count IV (embezzlement) as that count does not contain the limiting "no work" language at issue.

dence and instructions in the instant case. Convictions generally have been sustained as long as the proof upon which they are based corresponds to an offense that was clearly set out in the indictment. A part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as a useless averment that may be ignored. *United States v. Miller*, 471 U.S. 137, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) (citations omitted). "The particularity of time, place, circumstances, causes, etc., in stating the manner and means of effecting the object of a conspiracy for which petitioners contend is not essential to an indictment." *United States v. Cusmano*, 659 F.2d 714, 719-720 (6th Cir. 1981) (Kennedy, J., dissenting), (citing *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 463, 86 L.Ed. 680 (1942)).

The "no work" language at issue in the instant indictment is mere surplusage. The elements of the Rico charges are fully and specifically pleaded in the Rico "enterprise" and "pattern of Racketeering activity" sections of the indictment. In this regard, the "pattern of racketeering activity" sections name the particular defendants, their positions in the union, and their alleged criminal conduct in paying specific sums of union money to specific employees during particular time periods. Given this degree of detail as to the elements of § 501(c) embezzlement, it is clear that the additional particularity found in the "no work" language of the "Manner and Means" section of the indictment was not essential to the charges. The "no work" language, therefore, did not pertain to an element of the charges. As such no constructive amendment occurred when the proof presented at trial varied

from the facts alleged in the "Manner and Means" section of the indictment."

VII. Variance

Again, assuming, *arguendo*, that the indictment language at issue constitutes a "no work" theory, then the submission at trial of *de minimus* work evidence would require the conclusion that a variance between the indictment "no work" facts and trial evidence of insufficient work has occurred. As previously discussed, defendants then bear the burden of showing prejudice to either the ability to prepare a defense, to trial fairness or to the indictment's sufficiency to bar subsequent prosecutions.

In the instant case, the defendants have failed to meet this burden. There was no surprise here. The transcripts of various pre-trial hearings reflect the fact that all parties were clearly aware from the start of the case that the amount of work done by the employees in question would be a critical issue. Moreover, the defendants were supplied with *Brady* materials reflecting witness claims that employees Argie and Hughes actually worked. Finally, the government's opening statement disclosed that the government intended to offer the insufficient work evidence. Given these facts, defense counsel certainly should have been on notice that such evidence needed to be defended against. No prejudice to the ability of defendants to prepare a defense for trial can be said

⁶ This Court has carefully considered the Tenth Circuit case of *United States v. Varoz*, 740 F.2d 772 (10th Cir. 1984), on which defendants rely heavily. *Varoz* is distinguishable and therefore not persuasive. In *Varoz*, the statutory elements of the crime charged required proof that no medical service had been performed and that the defendant doctor billed Medicare for such services anyway. The evidence at trial established that services had actually been performed but were unnecessary. That case differs from the instant case in that the instant indictment language is "once removed", i.e., does not constitute part of the elements of the crime. As such, *Varoz* is not persuasive.

to have occurred. For the same reasons, it must be concluded that no trial unfairness occurred. Finally, neither defendant suggests that the variance affected his right to be protected from being placed in double jeopardy.

As defendants have failed to prove prejudice resulting from the variance, such variance amounted to harmless error. The motions for new trial on this ground are therefore denied.

Conclusion

For the above-stated reasons, the defendants are entitled to neither a judgment of acquittal for failure of proof nor a new trial because of trial error.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 5/5/89

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA
Plaintiff

Criminal Action
No. CR86-114

vs.

ORDER

JACKIE PRESSER, et al.
Defendants

In *Amidi v. Surety Title Agency*, No. 84-3974 (6th Cir. July 1, 1985) (unpublished opinion), the appellate court reversed this Court's denial of a motion that it recuse, which was filed by attorneys of the law firm of Climaco, Climaco, Seminatore, Lefkowitz & Garofoli. The Sixth Circuit concluded:

In the event of further applications for recusal of this judge by the law firm involved, we suggest referral of such application to another district judge for determination.

Slip op. at 4.

By letters of May 21, 1986, counsel for Jackie Presser and Anthony Hughes suggest that this Court recuse from this case. In compliance with the Sixth Circuit's instructions in *Amidi*, this Court refers the motion for recusal to the judge currently assigned the miscellaneous docket for this district. That judge shall also decide any motions to disqualify opposing counsel which impinge upon the recusal question.

IT IS SO ORDERED.

A-35

/s/ Ann Aldrich

ANN ALDRICH

UNITED STATES DISTRICT
JUDGE

ENTERED: 5/30/86

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

-v-

JACKIE PRESSER, ET AL.

Defendants

CASE NO. CR86-114

**JUDGE GEORGE W.
WHITE**

**MOTION TO FILE UNDER SEAL AND INSTANTER,
DEFENDANT ANTHONY HUGHES'
MOTION/APPLICATION TO
DISQUALIFY/RECUSE THE HONORABLE
ANN ALDRICH**

Now comes the Defendant Anthony Hughes and respectfully requests this Court's permission to file under seal and instanter, his Motion/Application to Disqualify/Recuse the Honorable Ann Aldrich so as to avoid embarrassment to Judge Aldrich, to ensure his right to a fair trial and to avoid further unnecessary pre-trial publicity regarding this matter.

It is further requested that the Motion/Application to Disqualify/Recuse the Honorable Ann Aldrich be kept and remain under seal except as is necessary to properly rule thereon and that all proceedings in this particular matter be conducted *in camera*. The reasons for these requests are more fully set forth

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 6/3/86

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**UNITED STATES OF AMERICA
PLAINTIFF,**

vs.

**JACKIE PRESSER, et. al.,
DEFENDANTS.**

**CR86-114
MEMORANDUM
AND ORDER**

On May 30, 1986 Judge Ann Aldrich issued an order referring *United States Of America v. Jackie Presser et.al.*, CR86-114 to this Court to decide the issue of whether Judge Aldrich should recuse herself from this case and to determine a motion to disqualify opposing counsel.

Prior to issuing this Order to this Court Judge Aldrich had received letters from counsel for Jackie Presser and Anthony Hughes defendants in this case regarding these issues. It is this Court's understanding that Judge Aldrich treated the letters as motions. However, on June 2, 1986 this Court received a letter from counsel for Jackie Presser notifying the Court that a motion would be filed.

Judge Aldrich's May 30, 1986 Order indicated that this Court was to also determine any motions to disqualify opposing counsel. In light of the Sixth Circuits opinion in *Amidi v. Surety Title Agency*, No. 84-3974 (6th Cir. July 1, 1985), this Court declines to decide any motions to disqualify opposing counsel. The only question properly before this Court is the recusal of Judge Aldrich.

It is noteworthy to indicate that this Court would not ordinarily have jurisdiction over another District Judge's matter. Yet, due to

the *Amidi* decision and the assignment of the motion to this Court by Judge Aldrich, this Court is willing to accept the responsibility of ruling upon this matter.

On June 3, 1986 this Court received under seal defendants' motions to recuse. The Court also received under seal affidavits from John R. Climaco counsel for defendant Jackie Presser, Michael L. Climaco counsel for Anthony Hughes, and defendants Jackie Presser and Anthony Hughes.

The Sixth Circuit in the *Amidi* opinion citing *Roberts v. Bailer*, 625 F2d. 125, 129 (6th Cir. 1980), set forth the standard to be applied in this situation:

No longer is a judge's introspective estimate of his own ability impartially to hear a case the determinate of disqualification under §455. The standard now is objective. It asks what a reasonable person would think about the impartiality of the judge. "If there is a reasonable basis for doubting the Judge's impartiality," the congressional committee reports on the 1974 amendmant to §455 explain, the judge "should disqualify himself and let another judge preside over the case." Even where the question is close, the judge whose impartiality might reasonably be questioned must recuse himself from the trial."

As Mr. Justice Frankfurter stated in withdrawing from a case *sua sponte*, in *Public Utilities Commission v. Pollak*, 343 U.S. 451(1952):

The judicial process demands that a judge move within the framework of relevant legal rules and covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feelings on every aspect of the case. There is a good deal of shallow talk that that judicial robe does not change the man within it. It does. The fact is that on the whole, judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self discipline and that fortu-

nate alchemy by which men are loyal to the obligation with which they are entrusted. *But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.* 343 U.S.466-467.

Under the circumstances, and in view of the factual situation set out in the affidavits of defendant Jackie Presser and Anthony Hughes, and their counsel I conclude that disqualification of Judge Ann Aldrich is indicated applying the reasonable person standard.

Accordingly, this case is to be returned to the Clerk Of Court for assignment by random draw pursuant to Local Civil Rule 7.09(1).

The matter of unsealing any papers in this case is deferred to the Judge to whom the case is assigned.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 6/4/86

WHITE, J.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

ORDER

v.

CR86-114

JACKIE PRESSER, et al.,

Upon consideration,

IT IS ORDERED that this case is hereby ordered returned to the Clerk of Court for a random draw pursuant to Local Civil Rule 7.09(1).

/s/ George W. White

George W. White

United States District Judge

ENTERED: 6/4/86

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACKIE PRESSER, et al.,

Defendants.

CASE NO.: CR86-114

JUDGE: JOHN

MANOS

**MOTION OF DEFENDANT FRIEDMAN TO
ENLARGE TIME FOR FILING MOTIONS FOR
DISCOVERY AND PARTICULARIZATION**

Now comes Defendant Harold Friedman, through Counsel, and moves this Court to enlarge the time for filing motions for discovery and a bill of particulars until July 7, 1986, on the grounds: 1) That Counsel requires additional time for the preparation and the filing of these motions because of the complexities of the issues raised by the indictment; 2) The fact that intervening proceedings concerning the assignment of this case resulted in expenditures of time not related to the preparation of necessary pretrial motions; and 3) the fact that Counsel has been heavily involved in the trial of *United States v. Khouri, et al.*, Case No. CR85-180, during the week of May 26, 1986, which resumes trial on June 23, 1986. This motion is made pursuant to Federal Rule of Criminal Procedure 45(b).

GRANTED: ✓

DENIED: _____

/s/ John M. Manos

U.S. District Judge

ENTERED: 6/10/86

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

-v-

ANTHONY HUGHES, ET AL.

Defendants

CASE NO. CR 86-114

**JUDGE JOHN M.
MANOS**

**MOTION TO ENLARGE THE TIME PERIOD IN
WHICH TO FILE DEFENDANT ANTHONY
HUGHES' MOTIONS FOR DISCOVERY AND FOR A
BILL OF PARTICULARS**

Now comes the Defendant, Anthony Hughes, pursuant to Rule 45(b) of the Federal Rules of Criminal Procedure and respectfully requests that the within Motion to Enlarge the Time Period in which to file Motions for Discovery and for a Bill of Particulars be granted for the reasons set forth in the Memorandum attached hereto.

Respectfully submitted,

/s/ Michael L. Climaco

Michael L. Climaco
1500 Leader Building
Cleveland, Ohio 44114
216/621-8484

Attorney for Defendant
Anthony Hughes

Of Counsel:

Climaco, Climaco, Semina-
tore, Lefkowitz & Garofoli
Co., L.P.A.

A-43

GRANTED: ✓

DENIED: _____

/s/ John M. Manos

U.S. District Judge

ENTERED: 6/10/86

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACKIE PRESSER, et al.

Defendants.

CASE NO. CR86-114

Judge John M. Manos

ORDER

Pursuant to L. Civ. R. 7.09(1), the above-captioned case is returned to the Clerk of Courts for reassignment.

IT IS SO ORDERED.

/s/ John M. Manos

**UNITED STATES DISTRICT
JUDGE**

ENTERED: 6/17/86

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, *et al.*

Defendants

CASE NO. CR 86-114

JUDGE GEORGE W.

WHITE

ORDER

All parties having been represented in open court by counsel on June 23, 1986, and a hearing having been held before the Honorable George W. White; IT IS HEREBY ORDERED

1) That all motions and other filings in this matter shall remain under seal until such time that this court rules otherwise;

2) Counsel for NBC/WKYC-TV3 is hereby granted an opportunity to review those pleadings previously sealed, which relate to the recusal of Judge Ann Aldrich; the Motion For Inquiry and Waiver Concerning Conflicts of Interest Faced by Attorneys John R. Climaco, Michael L. Climaco and Robert J. Rotatori, and the Memorandum in Support thereto, and; the Motion of Jackie Presser to Place Under Seal Motion Filed on June 13, 1986 by the United States of America and the Memorandum in Support thereto. However, counsel shall not disclose the content of the aforementioned material to its client or any other person;

3) Any responses or other filings by NBC/WKYC-TV3 shall hereafter be filed under seal until such time that this court rules otherwise.

A-46

IT IS SO ORDERED

/s/ George W. White

JUDGE GEORGE W. WHITE

ENTERED: 6/23/86

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACKIE PRESSER, *ET AL.*,

Defendants.

CASE NO. CR 86-114

JUDGE GEORGE W.

WHITE

MOTION TO FILE GOVERNMENT'S PLEADING
DATED JUNE 26, 1986 UNDER SEAL

The United States of America, through its undersigned attorneys, moves this Court to allow the United States to file under seal with the Court the government's pleading dated June 26, 1986. The United States submits that the need for sealing is apparent from the content of the pleading.

Respectfully submitted,

PATRICK M. MCLAUGHLIN

United States Attorney

IT IS SO ORDERED THIS 26th DAY OF JUNE, 1986.

/s/ George W. White

UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al.

Defendants

CR86-114

MEMORANDUM
AND ORDER

On June 4, 1986, upon hearing, this Court ordered that the disqualification of Judge Ann Aldrich from the case at bar was appropriate, based upon the factual situation set forth in the affidavits of defendants Jackie Presser and Anthony Hughes, and the opinion of the Sixth Circuit in *Amidi v. Surety Title Agency*, No. 84-3974 (6th Cir. July 1, 1985). At that time this Court ordered that the matter of the unsealing of any papers in this case was deferred to the Judge to whom the case would be assigned. Accordingly, the within action was returned to the Clerk of Court for assignment by random draw pursuant to Local Civil Rule 7.09(1), and assigned to Judge John M. Manos. On June 17, 1986, Judge Manos recused himself from the instant action and this case was reassigned to Judge George W. White.

This Court is presently faced with the determination of whether applicants National Broadcasting Company, Inc., and WKYC-TV3 should be allowed access to the sealed documents relating to the recusal of Judge Aldrich.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the United States Supreme Court held:

[T]he right to attend criminal trials is implicit in the guarantees of the first amendment; without the freedom to attend

such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated'.

Id. at 580, citing *Branzburg v. Hayes*, 408 U.S. 665 at 681. With respect to their holding however, this Court cautioned:

We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public,..., but *our holding today does not mean that First Amendment rights of the public and representatives of the press are absolute*. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, See, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 618 S.Ct. 762, 85 L.Ed. 1049 (1941), *so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to trial*.

Richmond at 581, n.18. [Emphasis added.]

The Court in *Richmond* declined to specify the manner in which these interests should be balanced, in view of the unique circumstances in that case. In *Sacramento Bee v. United States District Court*, 656 F.2d 477 (9th Cir. 1981), the Court employed the balancing tests found in Justice Stewart's plurality opinion in *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979), in a similar factual setting. These are as follows:

1. [W]as objection made at the time of the closure?
2. [D]id the public have a chance to object upon request?
3. [D]id the court balance the public's first amendment rights against the defendant's Sixth Amendment rights?
4. [W]as the denial of access based on a 'reasonable probability of prejudice' to the defendants?
5. [W]as the denial absolute or would a transcript be made available after the danger of prejudice passed?

Id. at 392 and 393.

Applying the above-mentioned factors to the case at bar, and after careful consideration, this Court determines that the material pertaining to the recusal of Judge Aldrich shall remain under seal, and applicants will be denied access.

First, applicants were afforded a timely opportunity for objection in that this Court sealed the materials in question on June 3, 1986 and applicants National Broadcasting Company, Inc., and WKYC-TV3 objected to the sealing of said materials on June 5, 1986. The documents in question include defendants' motion to recuse Judge Aldrich, affidavits from John R. Climaco, counsel for defendant Jackie Presser, Michael L. Climaco, counsel for defendant Anthony Hughes, and defendants Jackie Presser and Anthony Hughes. Upon hearing on June 23, 1986, this Court granted counsel for applicants permission to review the sealed materials, and to set forth any objections to the sealing of said documents on or before June 25, 1986.

In balancing the right of access to these materials against the defendants' Sixth Amendment right to a fair trial, this Court finds that the sealed documents relate to matters which are not relevant to the culpability of the within defendants. Nonetheless, in the event that this information would become available to the public, it is highly probable that it would cause potential jurors to become biased against the defendants. Additionally, there exists the possibility that potential jurors would become apprised of inculpatory information which would not be admissible at trial. See *Gannett v. DePasuale*, *supra*.

Further, in light of the enormous amount of pre-trial publicity generated by the instant action, and the difficulties anticipated in selecting an impartial jury absent the release of said information, there exists far more than a "reasonable probability of prejudice" to the within defendants, should the information in question be released. It is likewise significant that pre-trial proceedings have

not historically been open to the public, and the right of access has been specifically limited in this area. See *United States v. Hegge*, 631 F.Supp. 512 (E.D. Wash. 1986).

In order to preserve the public's interest in inspecting and scrutinizing public documents, a transcript including all of the materials in question will be made available for public inspection after the trial in this matter, as the danger of prejudice will have passed.

Accordingly, and in view of the foregoing, this Court orders that the documents relating to the recusal of Judge Aldrich shall remain under seal. The application of National Broadcasting Company, Inc., and WKYC-TV3 for access to materials is DENIED.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 6/27/86

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al.

Defendants

CR86-114

ORDER

Pursuant to the hearing held on June 26, 1986, this Court Orders that discovery in this case will be conducted as follows; (1) Defendants have Sixty (60) days from the date of this Order in which to complete discovery and any bill of particulars; and (2) Plaintiff's have Thirty (30) days thereafter in which to respond to any discovery motions filed by defendants.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 6/27/86

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al.

Defendants

CR86-114

MEMORANDUM
AND ORDER

On June 13, 1986, plaintiff, the United States of America, filed a motion for inquiry and waiver concerning conflicts of interest faced by attorneys John R. Climaco, Michael L. Climaco and Robert J. Rotatori, with Judge John M. Manos to whom this case was assigned at the time. On June 16, 1986, defendant, Jackie Presser, moved for permission to file a motion to have the plaintiff's motion for inquiry and waiver sealed. Plaintiff, the United States of America, filed a response to defendant, Jackie Presser's motion to file under seal on June 18, 1986. On June 20, 1986 applicants National Broadcasting Company, Inc. and WKYC-TV3 filed an application to obtain materials relating to the motion regarding defense counsel conflicts.

On June 23, 1986, this Court ordered that all motions and other filings in this matter would remain under seal until such time as the Court rules otherwise. Subsequently, this Court granted counsel for applicants permission to review the sealed materials, and counsel for all parties permission to set forth objections to, or support for the sealing of said documents on or before June 25, 1986. This Court is presently faced with the determination of whether applicants National Broadcasting Company, Inc., and WKYC-TV3, and Storer Communications, Inc. and WJW-TV8, should be allowed access to plaintiff's June 13, 1986 motion, currently

under seal. A similar issue was addressed by this Court with respect to the documents relating to the recusal of Judge Ann Aldrich in this action.

On June 25, 1986, Storer Communications, Inc., and WJW-TV8 filed an application asking for the same relief as the other applicant NBC. This Court's ruling as to NBC's request for the sealed recusal material of Judge Ann Aldrich applies to Storer Communications, Inc., and WJW-TV8, however, Storer Communications, Inc., and WJW-TV8 makes an additional request of other materials received by Judge Manos. This Court is not aware of any material relating to any alleged ex parte hearing held by Judge Manos and the court's file does not reflect the aforementioned material. Should the applicant Storer Communication, Inc., and WJW-TV8 wish to pursue this matter the applicant is advised that this Court lacks jurisdiction as to this issue.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the United States Supreme Court held that the right to attend criminal trials is implicit in the First Amendment. The Court cautioned, however, that the First Amendment rights of the public and representatives of the press, are not absolute. Due to the unique fact situation in *Richmond*, the Court declined to specify the manner in which the First Amendment right of access to trial of the public and representatives of the press should be balanced against the interest in the fair administration of justice. In *Sacramento Bee v. United States District Court*, 656 F.2d 477 (9th Cir. 1981), the Court employed the balancing tests found in Justice Stewart's plurality opinion in *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979), in a similar factual setting. These are as follows:

1. [W]as objection made at the time of the closure?
2. [D]id the public have a chance to object upon request?
3. [D]id the court balance the public's first amendment

rights against the defendant's Sixth Amendment rights?

4. [W]as the denial of access based on a 'reasonable probability of prejudice' to the defendants?
5. [W]as the denial absolute or would a transcript be made available after the danger of prejudice passed?

Id. at 392 and 393.

Applying the above-mentioned factors to the case at bar, and after careful consideration, this Court determines that plaintiff's June 13, 1986 motion and all pleadings responsive thereto, shall remain under seal, and that applicants will be denied access.

After careful review of plaintiff's June 13, 1986 motion for inquiry and the pleadings responsive thereto, this Court has ascertained that the materials contained in the aforementioned documents have no bearing on the culpability of the within defendants. Nonetheless, in the event that these documents would become available to the public, it is highly probable that it would cause potential jurors to become biased against the defendants. Additionally, there exists the possibility that potential jurors would become apprised of inculpatory information which would not be admissible at trial. *See Gannett v. DePasquale, supra.*

Based upon the arguments presented and the enormous amount of pre-trial publicity in this action, this Court finds that defendants' right to a fair trial mandates sealing of the materials in question, since pre-trial disclosure would make it virtually impossible to impanel an impartial jury, and would create far more than a "reasonable probability of prejudice" to the instant defendants. *See United States v. Hegge*, 631 F.Supp. 512 (E.D. Wash. 1986). Further, applying the *Gannett* tests to the case at bar, defendants' Sixth Amendment right to a fair trial outweighs the right of access to the sealed materials of the public and representatives of the press.

Accordingly, and in view of the foregoing, this Court orders that the documents relating to inquiry and waiver concerning conflicts of interest between defense counsel and defendants shall remain under seal. A transcript including all of the materials in question will be made available for public inspection after the trial in this matter, as the danger of prejudice will have passed. The application of National Broadcasting Company, Inc., and WKYC-TV3 for access is DENIED.

IT IS FURTHER ORDERED that the motion by Storer Communications, Inc., and WJW-TV8 be sealed for the same reasons as set forth above. After the trial is over a transcript will be provided as previously stated.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 6/27/86

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al.

Defendants

CR86-114

ORDER

On July 5, 1986, Applicants National Broadcasting Company, Inc., (NBC.) and (WKYC) filed a motion to reconsider the orders of this Court of June 27, 1986, denying applicant's request for access to pre-trial materials. Based upon this motion, this Court finds that in light of the United States Supreme Court's recent decision in *Press Enterprise Company v. Superior Court of California*, case No. 85-1560, decided on June 30, 1986; and due to the nature of the constitutional interests involved, defendants as well as the government shall be allowed until Friday, July 11, 1986 in which to respond to applicant's motion to reconsider the orders of this Court of June 27, 1986.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 7/7/86

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER et al.

Defendants

CR86-114

MEMORANDUM
AND ORDER

This matter is before the Court upon motion by the United States for an inquiry into possible conflict of interest faced by attorneys John R. Climaco, Michael L. Climaco and Robert J. Rotatori and their clients, Jackie Presser, Harold Friedman and Anthony Hughes, the defendants in this case. The Climacos are partners in the same law firm. The United States has moved this Court to inquire into several possible areas where conflict may arise between defense counsel, and between the defendants, and asked that defendants waive their right to conflict-free counsel, or that the Court remove counsel. The Sixth Amendment to the United States Constitution provides that in criminal prosecutions the accused shall enjoy the assistance of counsel for his defense.¹ The Courts have long recognized that the accused has a right to retain counsel of his choice. *Wilson v. Mintzes*, 761 F.2d 275 (6th Cir. 1985); *United States v. Reese*, 699 F.2d 803 (6th Cir. 1983).

The Court is obligated to inquire into possible conflicts of interest whenever two or more defendants are jointly represented by retained counsel who are associated in the practice of law. Federal Rules of Criminal Procedure 44(c). If the inquiry satisfies the Court that a possible conflict exists, it must notify the defendants. Defendants may retain new counsel or they may waive any rights to conflict-free counsel. *Brady v. United States*, 397 U.S. 742

(1970). Such waivers must be voluntary, and they must be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* at 748; *United States v. Krebs*, 788 F.2d 1166 (6th Cir. 1986). Further, a waiver of conflict-free counsel extends to unforeseen conflicts that might arise during trial. *Krebs* 788 F.2d at 1173.

This Court, after careful consideration is convinced that defendants have made a voluntary waiver of conflict-free counsel, and that those waivers are knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 7/14/86

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al.

Defendants

CR86-114

MEMORANDUM
AND ORDER

Applicants National Broadcasting Company, Inc., ("NBC") and WKYC-TV3 ("WKYC") have moved for reconsideration of this Court's two orders: (1) dated June 27, 1986, concerning the disqualification of Judge Ann Aldrich and (2) dated June 27, 1986, concerning sealing of plaintiff's motion for inquiry and waiver, in light of a recent decision of the United States Supreme Court in *Press-Enterprise Company v. Superior Court of California* Case No. 84-1560 decided on June 30, 1986. (*Press-Enterprise Company II*).

In *Press-Enterprise Company II*, the Court developed a two-pronged test to determine whether, in the first instance, information and access to certain criminal proceedings is available:

First, because "tradition of accessibility implies the favorable judgment of experience" we have considered whether the place and process has historically been open to the press and general public. *Id.* at 5, 6.

Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question. *Id.* at 6.

Thus, if these two "criteria" are satisfied, the public has a qualified right to access:

These considerations of experience and logic are, of course,

related, for history and experience shape the functioning of governmental processes. If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of access attaches. But even when a right of access attaches, it is not absolute. *Id.* at 7

In *Press-Enterprise Company II*, the Court considered a newspaper's right of access to a preliminary hearing. With respect to the first prong of the test that it announced, the Court concluded:

First, there has been a tradition of accessibility to preliminary hearings of the type conducted in California. *Id.* at 8.

With respect to the second component, the Court framed the question:

... whether public access to preliminary hearings as they are conducted in California plays a particularly significant positive role in the actual functioning of the process. *Id.* at 9.

and then answered the question by stating:

We have already determined in *Richmond Newspapers, Globe*, and *Press-Enterprise I* that public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system. California preliminary hearings are sufficiently like a trial to justify the same conclusion. *Id.* at 9.

Thus, the Supreme Court's second element of its two-part accessibility formula was satisfied because "...the preliminary hearing is often the final and most important step in the criminal proceeding" and "...in many cases provided 'the sole occasion for public observation of the criminal justice system'." *Id.* at 10.

Because, under the facts presented, both aspects of its two-part test had been met, the Court held that the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings as they are conducted in California. *Id.* at 11.

Neither element of the test announced by the Supreme Court in *Press-Enterprise Company II*, exists under the facts herein. With respect to the claim of access to the first series of documents requested, those related to the disqualification of Judge Aldrich, it cannot be said that proceedings of this type have "...historically been open to the press and general public." *Press-Enterprise Company II* at 6. With respect to the second criteria, whether access to such a proceedings "...plays a particularly significant positive role in the actual functioning of the process," *Press-Enterprise Company II* at 9, the disqualification of a trial judge is neither a proceeding which resembles a trial, a "...final and most important step in the criminal proceeding" nor the "sole occasion for public observation of the criminal justice system." *Press-Enterprise Company II* at 10.

Given the foregoing, it cannot be said that NBC and WKYC have any right of access under the Supreme Court's analysis in *Press-Enterprise Company II*, to the information sought regarding Judge Aldrich's disqualification.

With respect to the second category of documents sought, those relating to the Government's request for a court conducted inquiry as to certain alleged conflicts of interests among defense counsel, the same analysis warrants the same conclusion — NBC and WKYC do not have any right of access to this information. Again, the type of information and proceeding requested by the Government has not been historically conducted in the public eye. Indeed, the type of inquiry that the Government here seeks "...may occur on the record outside the presence of the Government" let alone the media. *United States v. Foster*, 469 F.2d 1, 5 (1st Cir. 1972). media. *United States v. Foster*, 469 F.2d 1, 5 (1st Cir. 1972).

Second, this type of proceeding cannot be said to play a "...significant positive role in the functioning of the particular

process in question." *Press-Enterprise Company II* at 6, as it is not "...like a trial." *Press-Enterprise Company II* at 9.¹

In *Press-Enterprise Company II*, the Court determined that closure is appropriate only if there is a "substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent" and there are no reasonable alternatives to closure that can adequately protect the defendant's fair trial rights. A finding that substantial probability does, in fact, exist such as to justify closure must be supported on the re-

¹ It should be noted however, that the Court did conduct an open hearing on part of this motion. That part of the motion in which an open hearing was conducted is ordered unsealed and is referred to in this order as exhibit A. Further the following documents having been filed under seal are hereby released:

1. Response of the U.S.A. to motion to file under seal defendant Presser and Hughes motion/application to disqualify/recuse Judge Aldrich. (June 4, 1985)
2. Application of NBC, to receive copies of material relating to Judge Aldrich's recusal. (June 5, 1986)
3. Defendant Friedman's brief in opposition to NBC/WKYC-TV3 application in Support to Sealing of material relating to disqualify/recusal. (June 16, 1986)
4. Response of the United States to defendant Presser's motion to place under seal the motion filed on June 13, 1986 etc. (June 18, 1986)
5. Application of National Broadcasting Company, Inc., *WKYC-TV3* — to obtain materials relating to motion re defense counsel conflicts and other materials under seal. (June 20, 1986)
6. Supplemental Memo; in support of application of NBC. (June 20, 1986)
7. Gov't Supplemental Citation to Motion For Inquiry. June 23, 1986
8. Defendant Friedman's Brief in Support or Request to Seal Gov't motion for inquiry and waiver of potential attorney conflicts. (June 25, 1986)
9. Defendant Anthony Hughes's Memo in Opposition to the applications of NBC to receive materials relating to Judge Aldrich's recusal. (June 25, 1986)
10. NBC's motion to reconsider orders of June 27, 1986 denying applicants' request for access to pre-trial proceeding. (July 3, 1986)
11. Application of NBC and WKYC for access to hearing re conflict of counsel filed under seal (July 10, 1986)
12. Brief of Defendant Jackie Presser in opposition to the motion of applicants to reconsider. (July 11, 1986).

cord by specific findings that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Company II*, at 11.

In *Press-Enterprise Company II*, the Court considered public access to a preliminary hearing of a defendant charged with twelve counts of murder. The Supreme Court decision does not disclose whether or not the defendant there filed extensive supportive documentation of exhibits, etc., in support of his request that information regarding the preliminary hearing not be made accessible to the public. The instant case, however, is factually dramatically different from the one considered in *Press-Enterprise Company II*. There, as stated, the record did not disclose substantial pre-indictment publicity; it is reasonable to conclude from the record that the publicity that was generated there commenced only after the issuance of an indictment. Here, however, the "Exhibits Filed On June 25, 1986 in Support Of Defendant Jackie Presser's Memorandum In Opposition To the Application Of the National Broadcasting Company and WKYC-TV For an Order Permitting Them To Receive Documents And Transcripts Relating To The Proceeding Seeking The Disqualification And/Or Reclusal Of the Honorable Ann Aldrich (hereinafter referred to collectively as "the Exhibits")" "disclose just some of the pre-indictment publicity that this case has already received. The Exhibits in their totality while only representing a mere sampling of the pre-indictment publicity that the Presser matter has generated seem to differ greatly from that presented to the Supreme Court in *Press-Enterprise Company II*.

Thus, this case has a "track record" that was missing in *Press-Enterprise Company II*.

CONCLUSION

Because Presser is entitled to a fair trial, Presser's right to a fair trial supersedes the public's right of access, *Press-Enterprise*

Company v. Superior Court, 464 U.S. 501 (1984); *Waller v. Georgia*, 467 U.S. 39 (1984), the publicity generated by the media has already created a high level of prejudicial pre-trial publicity such that there exists a "substantial probability" that Presser's right to fair trial will be prejudiced by further publicity generated in connection with the release of information regarding the disqualification of the Honorable Ann Aldrich and the pleading filed by the United States of America seeking a court inquiry into various alleged conflicts of interest, there exists no reasonable alternative to closure other than a release of such information and materials after the conclusion of the trial on the merits.

For the foregoing reasons and for the reasons stated in the Court's previous order, NBC and WKYC do not have a right of access to the information that they now seek by way of this motion for Reconsideration. The Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 7/22/86

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

CASE NO. CR 86-114

vs.

**JUDGE GEORGE W.
WHITE**

ANTHONY HUGHES, *et al.*

**MOTION FOR ENLARGEMENT OF TIME IN
WHICH TO COMPLY WITH THE COURTS JUNE 27,
1986 DISCOVERY ORDER**

Now comes defendant, Anthony Hughes, by and through counsel, and respectfully requests that the time limitations of this Court's June 27, 1986 Order be enlarged to September 10, 1986 for the reasons set forth below.

The investigation leading to the Indictment of Anthony Hughes began over four years ago, during which hundreds of people were interviewed by numerous governmental agencies.

Counsel for defendant Hughes has expended great efforts to review available material in preparing Motions for Discovery and a Bill of Particulars.

It is represented to the Court that despite these efforts additional time is needed to adequately prepare the Motions.

In addition, counsel for Harold Friedman has been in trial during the period that counsel for Hughes has been preparing the

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MOTION GRANTED.
IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 8/26/86

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA, CASE NO.: CR86-114
Plaintiff, JUDGE: WHITE

vs.

JACKIE PRESSER, et al.,
Defendants.

**DEFENDANT FRIEDMAN'S MOTION
TO ENLARGE TIME**

Now comes Defendant Harold Friedman, through Counsel, and moves this Court to enlarge the time for filing Request for Discovery and for a Bill of Particulars until Wednesday, September 10, 1986, on grounds that Defendant's Counsel has been exclusively occupied with the trial of *U.S.A. v. Khouri, et al.*, CR85-180, and that the press of this other business has prevented Counsel from completing the final drafting and revising of the necessary Motions.

Respectfully submitted, .

/s/ Susan L. Gragel

GOLD, ROTATORI, SCHWARTZ &
GIBBONS

By: ROBERT J. ROTATORI
SUSAN L. GRAGEL

1100 Ohio Savings Plaza
Cleveland, Ohio 44114
(216) 696-6122

COUNSEL FOR DEFENDANT
FRIEDMAN

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MOTION IS GRANTED.
IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 8/29/86

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACKIE PRESSER, et al.,

Defendants.

CASE NO.: CR86-114

JUDGE: GEORGE

W. WHITE

**DEFENDANT FRIEDMAN'S MOTION TO EXTEND
THE DATE FOR FILING PRELIMINARY MOTIONS**

Now comes Defendant Harold Friedman, through Counsel, and moves this Court to extend the deadline for filing a Motion for Bill of Particulars and Motion for Discovery until September 30, 1986, on the following grounds:

(1) Counsel previously requested a continuance of the filing deadline until September 10, 1986;

(2) Since the filing of the last Motion for Continuance, Counsel for Defendant Friedman has been exclusively occupied with the preparation of extensive Motions for Judgment of Acquittal with supporting memoranda, with the review of the Government's trial exhibits and with preparations for the presentation of the defense in *United States v. Khouri, et al.*, Case No. CR85-180;

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 9/12/86

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

-v-

CASE NO. CR 86-114

**JUDGE GEORGE W.
WHITE**

JACKIE PRESSER, ET AL.

Defendants

**MOTION TO FILE DEFENDANTS JACKIE
PRESSER'S AND ANTHONY HUGHES' PLEADINGS
DATED SEPTEMBER 10, 1986 UNDER SEAL**

The Defendants Jackie Presser and Anthony Hughes, through their undersigned attorneys, move this Court to allow them to file under seal with the Court their pleadings dated September 10, 1986. The Defendants submit that the need for sealing is apparent from the content of the pleadings as well as the Memoranda in Support.

Respectfully submitted,

/s/ John R. Climaco

John R. Climaco

Paul S. Lefkowitz

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216/621-8484

Attorneys for Defendant

Jackie Presser

Of Counsel:

Climaco, Climaco, Semina-
tore, Lefkowitz & Garofoli
Co., L.P.A.

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**MOTION DENIED.
IT IS SO ORDERED.**

JUDGE /s/George W. White

ENTERED: 9/15/86

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACKIE PRESSER, *ET AL.*,

Defendants.

CASE NO. CR86-114

JUDGE GEORGE W.

WHITE

**MOTION FOR A TWO WEEK PERIOD IN WHICH
TO RESPOND TO THE GOVERNMENT'S REQUEST
FOR COURT SUPERVISED DISCLOSURE OF
BRADY MATERIALS**

Now come defendants Jackie Presser and Anthony Hughes, by and through counsel, and respectfully request that they be granted a two week period in which to file a response addressing the disclosure issue presented by the Government in its request for an order limiting the defendants in the use of *Brady* documents in the preparation of their defense.

The Government requests in the motion entitled, Government's Request For Court Supervised Disclosure of Brady Materials that:

...the court to order the government to provide copies of the above-referenced documents to all defendants on the condition the defendants and

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 10/31/86

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

v.

JACKIE PRESSER, ET AL.,
Defendants.

**CASE NO. CR86-114
JUDGE GEORGE W.
WHITE**

**MOTION FOR ENLARGEMENT OF TIME IN
WHICH TO RESPOND TO THE GOVERNMENT'S
DISCOVERY RESPONSES**

Now come defendants Jackie Presser and Anthony Hughes, by and through counsel, and respectfully request that the time period in which said defendants may have to file responses to the discovery responses of the Government be enlarged to December 1, 1986 for the reasons set forth below.

On June 27, 1986 this Court entered an Order setting forth the time periods in which the within parties were to conduct discovery.

On September 10, 1986 defendants Jackie Presser ("Presser") and Anthony Hughes ("Hughes") each filed a Motion for a Bill of Particulars and together filed a Motion for Pretrial

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 10/31/86

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

v.

JACKIE PRESSER, ET AL.,
Defendants.

**CASE NO. CR86-114
JUDGE GEORGE W.
WHITE**

**MOTION FOR ENLARGEMENT OF TIME IN
WHICH TO FILE PRE-TRIAL MOTIONS**

On September 10, 1986 Defendants Jackie Presser (herein after "Presser") and Anthony Hughes (hereinafter "Hughes") filed with this Court their Discovery Requests and Motions for Bills of Particulars. Simultaneously with the filing of this Motion, Presser and Hughes are filing their Motion to Strike Surplusage from the Indictment. In their Discovery Requests, defendants identified some of the motions that they intended to file after the Government provided the information sought by the Discovery Requests and the Motions for Bills of Particulars.

This is far from a routine criminal case. Instead, history will show that this case stands alone in United States criminal jurisprudence. The Government's responses to the Defendants' Discovery Requests (together with the written report of the

**MOTION GRANTED. DEFTS. GRANTED LEAVE TO
FILE FURTHER PRETRIAL MOTIONS AFTER
RECEIPT OF DISCOVERY.**

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 10/31/86

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JACKIE PRESSER, *ET AL.*,
Defendants.

CASE NO. CR86-114
JUDGE GEORGE W.
WHITE

MOTION TO EXTEND TIME WITHIN WHICH TO
RESPOND TO DEFENDANT FRIEDMAN'S
OMNIBUS MOTION

The United States of America, through its undersigned attorneys, hereby requests an extension of time until January 23, 1987 to respond to the Omnibus Motion filed by defendant Harold Friedman.

To the government's knowledge, the defendant's motion was filed on or about December 24, 1986. The government received service by mail. Under Rule 45(a) and 45(e) of the *Federal Rules of Criminal Procedure* and the local rules of this Court, the government's reply is due on January 12, 1987.

Special Attorneys Stephen H. Jigger and Bernard A. Smith, the Cleveland Strike Force attorneys assigned to try this case, both were on annual leave over the holidays and did not return to work until January 5, 1987. Other assigned duties have prevented Mr. Jigger and Mr. Smith from completing the response to defendant Friedman's Omnibus Motion during the week of January 5,

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 1/20/87

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JACKIE PRESSER, ET AL.,
Defendants.

**CASE NO. CR86-114
JUDGE GEORGE W.
WHITE**

**MOTION OF DEFENDANTS JACKIE PRESSER AND
ANTHONY HUGHES TO STRIKE SURPLUSAGE
FROM THE INDICTMENT**

Now come Defendants Jackie Presser (hereinafter "Presser") and Anthony Hughes (hereinafter "Hughes") and move this Honorable Court pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure for an order striking surplusage from the Indictment. A Memorandum in Support of this Motion is incorporated herewith and appended hereto.

Respectfully submitted,

/s/ John R. Climaco

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216/621-8484

Attorneys for Defendant
Jackie Presser

Of Counsel:

Climaco, Climaco, Seminatore,
Lefkowitz & Garofoli Co.,
L.P.A.

MOTION DENIED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 1/23/87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

CR86-114

vs.

ORDER

JACKIE PRESSER, ET AL.,
Defendants.

This matter is before the Court upon defendant Harold Friedman's motion for notice of joinder. This Court orders that defendant Harold Friedman's motion to adopt certain motions filed on behalf of co-defendants Jackie Presser and Anthony Hughes IS HEREBY DENIED. This Court made a ruling in open court that all defendants must file separate motions. Accordingly, defendant's motion IS DENIED.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 1/23/87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

CR86-114

vs.

ORDER

JACKIE PRESSER, et al.,
Defendants.

This matter is before the Court upon defendants Presser, Hughes and Friedman's motion for disclosure of Brady materials and the government's request for court-supervised disclosure of Brady materials.

After careful review of all parties briefs pertaining to Brady material, this Court orders the government to provide all Brady material to defendants. Further, it is this Court's order that if the government has any questions as to whether material which constitutes Jencks material might also be Brady material the government must request an in camera hearing so that this Court can determine the status of the material.

IT IS SO ORDERED.

/s/ George W. White

George W. White

— U.S. DISTRICT JUDGE

ENTERED: 1/28/87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

CR86-114

vs.

ORDER

JACKIE PRESSER, et al.,
Defendants.

This matter is before the Court upon defendants Presser, Hughes and Friedman's motion for bill of particulars. As to each of the defendant's motion this Court denies these requests based upon the reasons set forth in the government's response briefs.

All defendants' motions for bill of particulars are **HEREBY DENIED.**

IT IS SO ORDERED.

/s/ George w. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 1/28/87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

CR86-114

vs.

ORDER

JACKIE PRESSER, et al.,
Defendants.

This matter is before the Court upon defendants Presser, Hughes and Friedman's motion for discovery requests and production of documents. As to these requests this Court has scheduled an oral hearing on March 2, 1987, at 10:00 a.m., to respond to these requests. Any other motions which are outstanding will be heard at this time.

IT IS SO ORDERED.

/s/ George M. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 1/28/87

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

CR86-114

vs.

ORDER

JACKIE PRESSER, et al.,
Defendants.

This matter is before the Court upon defendant Harold Friedman's Omibus motion. Defendant's motion consists of parts B thru G. This Court will address each separate portion.

Portion B requests that this Court enter an Order requiring the government to disclose whether or not they intend to utilize witnesses or evidence pursuant to the provisions of Rule 404.

As to this request the Court concurs with the government's response brief and denies defendant Friedman's request B.

Portion D request a motion for retention of government Agents' rough notes. AS to this request the government is ordered to retain all of the government's agents rough notes. Portion D IS **HEREBY GRANTED.**

Portion E request Brady material which has been discussed in another order, but the government is required to disclose all Brady material to all defendants.

Portion F request the government to declare its intent to offer certain evidence. As to this portion the Court concurs with the government's response brief and denies defendant's request.

Portion G request a James hearing prior to trial. As to this request the Court denies defendant's motion. This Court will admit hearsay statements conditionally subject to a later determination of admissibility after the Court reviews the evidence.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 1/28/87

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No. 86-3735

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee

CR86-114

ORDER

vs.

JACKIE PRESSER;

HAROLD FRIEDMAN;

ANTHONY HUGHES,

Defendants-Appellees,

NATIONAL BROADCASTING

COMPANY, INC.; WKYC-TV3;

Applicants-Appellants

This cause comes before the court upon the motion of the appellants for leave to view certain material held under seal.

Upon consideration of the motion and the memorandum of law offered in support thereof; it is

ORDERED that the motion is denied as to the transcript of proceedings before the district court and those documents filed with this court containing copies of such transcript; the balance of the record and papers are hereby released from seal and are available for inspection in the clerk's office.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ John P. Hehman

ENTERED: 2/4/87

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

CR86-114

vs.

**MEMORANDUM
AND ORDER**

JACKIE PRESSER, et al.,
Defendants.

On March 9, 1987 at 10:00 a.m. this Court held an oral hearing in open court to take up defendants Presser, Hughes and Friedman's motion for discovery requests and production of documents. Also, at this hearing the Court indicated that it would address any other pending motions.

After careful inspection and review of the two hundred and eleven (211) requests, this Court Orders the government to turn over, forthwith, to the defendants all documents, memoranda, notes or interview reports, airtels, tangible objects and other information, including, but not limited to, videotapes, other recordings or any summaries or transcripts whether or not they are work product which contain exculpatory material. However, prior to delivery of this material to defendants, the government may move for a protective order if it deems such a motion necessary.

In addition, the government is ordered to provide copies of all documents, memoranda, statements, affidavits, and depositions, if any, which have been provided by the government to members of the news media including, but not limited, to the following reporters and the following information.

- (1) Brian Ross, Investigative Reporter for NBC;

- (2) Ike Pappas, Investigative Reporter for CBS;
- (3) Rita Braver, Department of Justice Reporter for CBS;
- (4) Walt Bogdanovich, Former Reporter for the *Plain Dealer*;
- (5) Stephanie Saul, Former Reporter for the *Plain Dealer*;
- (6) Mary Jayn Woge, Reporter for the *Plain Dealer*;
- (7) John Griffith, Reporter for the *Plain Dealer*, and in particular:
 - (a) June, 1984 January, 1985 and April 1985 memoranda from the Cleveland Strike Force to David Margolis and/or Paul Coffey.
- (8) Robert Jackson and Ronald Ostrow, Reporters for the *Los Angeles Times*, including:
 - (a) June, 1984 and January, 1985 memoranda from the Cleveland Strike Force to Messrs. Margolis and Coffey; and;
 - (b) December, 1985 memoranda from Cleveland Strike Force Chief to Paul Coffey.

Any remaining discovery issues will be addressed at the May 5, 1987 hearing.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 3/19/87

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,	CASE NO. CR86-114
<i>Plaintiff,</i>	JUDGE GEORGE W.
<i>v.</i>	WHITE
JACKIE PRESSER, <i>ET AL.</i> ,	
<i>Defendants.</i>	

**MOTION TO SEAL DOCUMENT SUBMITTED
TO THE COURT**

The United States of America, through its undersigned attorneys, moves to seal the following document which is submitted to the Court for its *in camera* review pursuant to the Court's order at a hearing conducted March 9, 1987: an undated draft prosecutive memorandum concerning Jackie Presser, Harold Friedman and Anthony Hughes submitted in June 1984 by Steven R. Olah and Stephen H. Jigger, Special Attorneys, Cleveland Strike Force, to Paul E. Coffey, Deputy Chief, Organized Crime and Racketeering Section; United States Department of Justice. The government notes that this document requested by the Court is a draft prosecutive memorandum, not the final prosecutive memorandum.

A sealing order concerning this document is justified for two reasons. First, the document is replete with summarized grand jury material protected from disclosure under Rule 6(e) of the *Federal Rules of Criminal Procedure*. Second, the memorandum

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 3/19/87

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

v.

JACKIE PRESSER, ET AL.,
Defendants.

CASE NO. CR86-114

**JUDGE GEORGE W.
WHITE**

ORDER

Upon consideration of the government's motion for a protective order in the above-captioned case, it is ORDERED both that the government shall provide the following grand jury materials (as identified in its motion) to defense counsel and that the defendants and defense counsel shall not, except for disclosures to staff for defense counsel and prospective witnesses, disseminate these materials further:

1. redacted grand jury testimony of Gail George Munitz, dated August 11, 1982,
2. redacted grand jury testimony of Barbara Walden dated August 11, 1982,
3. redacted grand jury testimony of George Argie, dated November 15, 1983,
4. redacted grand jury testimony of Betty Logan, dated July 24, 1984,
5. redacted grand jury testimony of Robert Langford, dated January 16, 1986,
6. redacted grand jury testimony of Thomas Kimmel, dated January 17, 1986,

7. redacted grand jury testimony of the following bakery representatives: Paul Schwebel, John Wallace, William Smith, Arthur Pile, Jr., Donald Penn, Edward Ryan, Fred Warren, Clement Collogan, Steven Pincus, Richard Reinecker, and Albert Borally.

IT IS SO ORDERED.

/s/ George W. White

George W. White

UNITED STATES DISTRICT JUDGE

DATE 4/6/87

ENTERED: 4/6/87

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

v.

JACKIE PRESSER, ET AL.,
Defendants.

**CASE NO. CR86-114
JUDGE GEORGE W.
WHITE**

ORDER

Upon consideration of the government's second motion for a protection order filed in the above-captioned case on April 20, 1987, it is **ORDERED** both that the government shall provide the following redacted grand jury materials reflecting exculpatory information to defense counsel and that the defendants and defense counsel shall not, except for disclosures to staff for defense counsel and prospective witnesses, disseminate these materials further:

1. redacted grand jury testimony of FBI Special Agent Anthony Riggio, dated January 16, 1986,
2. redacted grand jury testimony of FBI Special Agents James Moody, dated October 23, 1985,
3. redacted grand jury testimony of Organized Crime and Racketeering Section Chief David Margolis, dated February 26, 1986,
4. redacted grand jury testimony of Organized Crime and Racketeering Deputy Chief Paul Coffey, dated September 27, 1985,

redacted grand jury testimony of Special Attorney Steven R. Olmstead dated October 22, 1985, and

6. redacted grand jury testimony of Special Attorney Stephen H. Jigger, dated September 25, 1985.

IT IS SO ORDERED.

/s/ George W. White

George W. White

UNITED STATES DISTRICT JUDGE

4/22/1987

ENTERED: 4/22/87

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACKIE PRESSER, ET AL.,

Defendants.

CASE NO. CR86-114

JUDGE GEORGE W.

WHITE

**MOTION TO SEAL DOCUMENTS SUBMITTED
TO THE COURT**

The United States of America, through its undersigned attorneys, moves to seal the following documents submitted to the Court for its *in camera* review pursuant to the Court's oral order entered at a pre-trial hearing in the above-captioned case on May 5, 1987:

1. Prosecutive Memorandum, consisting of 174 pages and additional attachments, dated January 29, 1985 (Section R of this document, entitled "Informant Issue," appearing on pages 140-148 of this document already has been provided to the defense);
2. Evaluative Memorandum of Paul Coffey, consisting of 25 pages, dated March 5, 1985;
3. Evaluative Memorandum of Steven R. Olah and Stephen H. Jigger, consisting of 30 pages, dated May 31, 1985;

4. Evaluative Memorandum of Paul Coffey, consisting of 4 pages, dated June 4, 1985;

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 5/5/87

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,

CR86-114

Plaintiff,

vs.

**MEMORANDUM
AND ORDER**

JACKIE PRESSER, et al.,

Defendants.

On June 16, 1987 this Court held a hearing in which the Court determined the status of all pending motions. Furthermore, the Court made rulings on the following motions:

(1) Defendants' motion to dismiss the indictment on the grounds of duplicity and multiplicity.

(2) Defendants' motion to dismiss Counts I and II of the indictment.

(3) Defendant Harold Friedman's motion to seal motion and affidavit submitted to the Court and;

(4) Motion of Defendant Harold Friedman for disclosure of certain statements of co-defendants Presser and Hughes and certain files of government and law enforcement agencies.

As to defendants' motion to dismiss the indictment on the grounds of duplicity and multiplicity this Court finds that Count I of the indictment charges a substantive RICO offense in violation of Title 18, United States Code, Section 1962(c), and Count II, charges RICO conspiracy in violation of Title 18, United States Code, Section 1962(d). After careful review of defendants' motion, the brief in opposition and the indictment itself this

Court finds no existence of multiplicity or duplicity in the indictment. Accordingly, defendants' motion IS HEREBY DENIED.

As to defendants' motion to dismiss Counts I and II of the indictment this Court has reviewed defendants' motion and the brief in opposition and makes the following conclusion.

Defendants' main argument is that Count I and II must be dismissed for failure to allege a "pattern" of racketeering activity and the Count I and II do not allege any financial purpose. Count I and II arises under the Racketeer Influence and Corrupt Act (hereinafter referred to as RICO). After careful review of this matter this Court takes the position that Count I and II satisfy the "continuity plus relationship" requirement set forth in *Sedima, S.P.R.L. V. Imrex Co., Inc.*, 105 S.Ct. 3275 (1985). Further this Court finds that it is not necessary that the entire RICO enterprise have a financial purpose. See, *United States v. Ivic*, 700 F.2d 51, (2d Cir. 1983).

Accordingly, defendants' motion to dismiss Count I and II of the indictment IS HEREBY DENIED.

Defendant Harold Friedman's motion to seal the motion for disclosure of certain statements of Co-defendants Presser and Hughes and certain files of government and law enforcement agencies has been sealed until the government has had an opportunity to respond to this motion. After the Court receives the government's response this Court will make a ruling on this motion.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 6/26/87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACKIE PRESSER, *et al.*

Defendants.

CASE NO. CR86-114

JUDGE GEORGE W.

WHITE

ORDER

This matter is before the Court upon the government's motion to depose Allen Friedman on videotape before trial. This motion was brought pursuant to Rule 15 of the Federal Rules of Criminal Procedure, which provides that the testimony of a prospective witness may be taken and preserved for trial "whenever due to exceptional circumstances of the case it is in the interest of justice".

After careful review, this Court concludes in its discretion that the prospective witness' testimony is material and that the unavailability requirement has been satisfied. Therefore, this Court grants the government thirty (30) days from the date of this order to depose Allen Friedman.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. District Judge

ENTERED: 8-21-87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACKIE PRESSER, et al.,

Defendants.

CASE NO. CR86-114

MEMORANDUM

AND

ORDER

This matter is before the Court, upon defendants Presser, Friedman, and Hughes' motion for disclosure of impeachment material. Defendants specifically request that impeachment material, separate and apart from exculpatory material which this Court has previously ordered to be disclosed, is discoverable and request the production of such material. The governments' response to the above-mentioned motion first directs the Courts attention to a point which the parties do agree. The United States concedes that it must disclose to the defendants impeaching materials within its possession relating to witnesses called by the government to testify against the defendants. However, the government raises two issues upon which the parties disagree. The issues are as follows: 1) must impeaching material be produced before trial or may they be produced at trial in time for the defendants to make use of them, and 2) must the government provide to the defendants impeaching materials *unfavorable* to the defense which the government may use to cross examine witnesses called to testify on behalf of the defendants.

The Supreme Court has defined impeachment material as "evidence favorable to an accused ... so that, if disclosed and use effectively, it may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. ___, 105 S.Ct. 3375.

3380 (1985). Impeachment evidence need not be exculpatory in the traditional sense of tending to negate guilt. Rather, such material deals with the credibility of witnesses.

In *Giglio v. United States*, 405 U.S. 150, 154 (1972), the Supreme Court held that:

When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule.

The general rule articulated in *Giglio*, is the Brady rule. See: *Brady v. Maryland*, 373 U.S. 206 (1963).

In, addressing the issue of the timing of disclosure, this Court finds that any and all impeachment material in the possession of the prosecution is to be turned over to the defense forthwith. Specifically, regarding the impeachment testimony relating to government agents McLann, Foran, Friedrich and any other present or former agents this Court believes that these witnesses credibility will be material to the establishment of defendants authorization defense. Accordingly, defenses' motion for disclosure of impeachment material is Hereby Granted.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. District Court

ENTERED: 8-21-87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

v.

JACKIE PRESSER, et al.

Defendants.

CASE NO. CR86-114

JUDGE GEORGE W.

WHITE

MEMORANDUM

AND

ORDER

This matter is before this Court, pursuant to Defendant's motion seeking either an order requiring that witnesses under government control submit to deposition or for an order compelling the United States of America, to authorize its attorneys, agents, and other employees to be interviewed by representatives of Defendants. For reasons forthcoming, Defendants request for an order that government witnesses submit to deposition is Hereby Denied and the following is addressed to the request for interviews.

Defendants have requested interviews with various members of the Department of Justice (DOJ), Federal Bureau of Investigation (FBI), Department of Labor (DOL), and Department of Treasury (BAFT). To date, Deputy Assistant Attorney General has authorized some DOJ and FBI personnel to "grant the requested interview, if you wish to do so." Mr. Keeney's authorization letter limited the subject matter of the interviews to the following areas:

1) conversations you personally participated in, if any, with a defendant in the pending *Presser* indictment concerning the criminal acts alleged in that indictment; and

2) acts, if any, of which you have personal, direct knowledge that were performed by a defendant in the pending *Presser* indictment and that relate to the criminal acts alleged in that indictment, a copy of which is enclosed for your information.

The Department of Treasury (BAFT) has issued a similar authorization letter. The DOL has denied defendants' requests to interview any of its current or former employees. In addition, the DOJ has denied defendants access to interview members of the FBI's Undercover Review Commission absent "a reasonable and particularized need."

Defendants claim that the government's restrictions and refusals "unduly restrict" their ability to interview potential witnesses and that the limitations "constitutes improper interference with our clients right of access to prospective witnesses." This Court agrees. The law is clear in the Sixth Circuit:

A witness is not the exclusive property of either the government or the defendant ... A defendant is entitled to have *access* (emphasis original) to any prospective witness although such right of access may not lead to an actual interview ... Any defendant has the right to attempt to interview any witness he desires ... also any witness has the right to refuse to be interviewed, if he so desires (and is not under or subject to legal process) ... Certainly, the prosecution has no right to interfere with or prevent a defendant's access to a witness (absent any overriding interest in security). *United States v. Scott*, 518 F.2d 261, 268 (6th Cir. 1975). [citations and footnote references omitted].

However, this Circuit has recognized that the DOJ has a legitimate interest in regulating access to government information. *United States v. Morino*, 658 F.2d 1120, 1125 (6th Cir. 1981).

Specifically, this Circuit has held that defendants' need to follow the statutory procedures of Title 28 C.F.R. §16.23(c) for making a demand on the DOJ to disclose official information. *Ibid*.

Upon review of the record, this Court finds that defendants have complied with 28 C.F.R. §16.23(c) in respect to the 46 witnesses originally named. Further, this Court finds insufficient justification for the additional restrictions placed on defendant's interviews. Mr. Keeney's conditions that an interviewee is not to disclose the identity of informants; grand jury materials covered by Fed. R. Cr. P. 6(e); and information regarding prosecutions or investigations other than the Presser case coupled with an interviewee's personal option of refusing to be interviewed or request counsel to be present at the interview are seen as adequate safeguards of the government's interest while allowing defendants a fair chance to obtain meaningful interviews.

Accordingly, this Court orders the United States of America to advise the 46 witnesses named, and any subsequent witnesses submitted by defendants in compliance with 28 C.F.R. §16.23(c), that they are at liberty to discuss the facts of this action with defense counsel, if they wish to do so, although such witnesses may refuse to be thus interviewed. Defendant's motion is Hereby Granted in part and Hereby Denied in part.

IT IS SO ORDERED.

/s/ George W. White

GEORGE W. WHITE
U.S. DISTRICT COURT

ENTERED: 8-21-87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACKIE PRESSER, ET AL.,

Defendants.

CASE NO. CR86-114

MEMORANDUM

AND

ORDER

This matter is before the Court pursuant to defendant's motion to dismiss based on disclosure of confidential or secret information to the media. Defendant's motion based on media leaks involve three related claims: 1) Government generated pretrial publicity rendering the court unable to provide a fair trial; 2) Government-generated pre-indictment publicity prejudicing the investigating and indicting grand juries; and 3) Government representatives violating Fed. R. Crim. P. 6(e).

Regarding defendant's claim that no fair trial for the defendant's is possible because of government-generated pretrial publicity, this Court finds that the extreme remedy of dismissal of the indictment is unwarranted. Watergate generated an equal or greater amount of pretrial publicity than the case before us and careful *voir dire* adequately insured the Defendant's due process right to a fair trial. *United States v. Haldeman*, 559 F.2d 31, 62 n.37 (D.C.Cir. 1976). There is no reason to believe the same remedy in this case will be any less effective. If a *voir dire* indicates that the publicity had created significant bias against the defendants, then remedies of continuances or changes of venue would also be available. *United States v. Curcio*, 712 F.2d 1532, 1545 (2d Cir. 1983). For these reasons, Defendant's motion to dismiss the indictment on grounds that government-generated pretrial

publicity has eliminated the Defendant's chances of obtaining a fair trial is Hereby Denied.

As well, this Court is not persuaded to overturn the Defendant's indictment on grounds that government-generated pre-indictment publicity prejudiced the Grand Jury. Dismissal of the indictment on grounds of a biased Grand Jury requires a heavy burden of proof with specific showings of prejudicial effect of pre-indictment publicity. *United States v. Osborn*, 350 F.2d 497, 507 (6th Cir. 1965); *United States v. Civella*, 648 F.2d 1167, 1174 (8th Cir. 1981). Upon review of the entire record, this Court finds that the Defendants have not satisfied their burden of specifically showing that publicity prejudiced the indicting Grand Jury. Accordingly, this Court finds no basis to exercise its supervisory power to overturn the defendant's indictment. Defendant's motion is Hereby Denied in relevant part.

However, Defendants third claim regarding violations of Fed. R. Crim P.6(e) bear some merit. Though this Court will not dismiss this case on the ground of Fed. R. Crim. P. 6(e) violations, this Court is satisfied that defendants set forth a sufficient *prima facie* showing of a violation of the rule governing disclosure of matters occurring before the Grand Jury so as to warrant an evidentiary hearing to determine the responsible parties and possible sanctions. This matter and any other matter pending in this case will be addressed on September 29, 1987. Defendant's motion is Hereby Denied in part and Granted in part.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 8-21-87

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al.

Defendants

CASE NO. CR86-114

MEMORANDUM

AND

ORDER

This matter is before the Court upon defendants, Jackie Presser and Anthony Hughes' motion to require the government to declare its intent to use evidence admissible under F.R.E. 404(b) during its case-in-chief and under F.R.E. 608(b) during cross-examination. Defendants' motion is requesting the government to specifically disclose its intention to utilize witnesses or evidence establishing crimes, wrongs, bad acts or similar courses of conduct and specific instances of conduct as provided in Fed. R. Evid. 608(b).

After reviewing defendants' motion this Court concludes that Rule 12(d)(2) of the Federal Rules of Criminal Procedure encompasses defense requests that the government

Defendants request this Court to assert its discretion to permit discovery of Rule 404(b) materials despite the express statement in Rule 12(d)(2) that discovery beyond the scope of Rule 16 is not contemplated. After reviewing the briefs and the case law on this matter, this Court declines at this time to require the government to declare its intention to use Rule 404(b) material during its case-in-chief.

Accordingly, Presser and Hughes' motion is Hereby Denied.
IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 8-21-87

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 88-3735

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**APPLICATIONS OF NATIONAL
BROADCASTING COMPANY,
INC., and WKYC-TV3,
*Intervenors-Appellants.***

**ON APPEAL from the
United States District
Court for the Northern
District of Ohio.**

**UNITED STATES OF AMERICA,
Plaintiff-Appellee.
v.**

**JACKIE PRESSER, HAROLD
FRIEDMAN, and ANTHONY
HUGHES,
*Defendants-Appellees.***

Decided and Filed July 31, 1987

**Before: LIVELY, Chief Judge; RYAN, Circuit Judge; and
JOINER, District Judge.***

**LIVELY, Chief Judge, delivered the opinion of the court, in
which JOINER, Senior District Judge, joined. RYAN, Circuit
Judge (pp. 16-31) delivered a separate dissenting opinion.**

*** The Honorable Charles W. Joiner, Senior Judge, United States District Court
for the Eastern District of Michigan, sitting by designation.**

LIVELY, Chief Judge. This is one of two appeals now before this court arising from preliminary proceedings in the prosecution of Jackie Presser, the president, and two other officials of the Teamsters Union. Neither appeal involves matters directly related to the question of the guilt or innocence of the defendants. The appellants in both cases seek media access to the sealed records of certain pretrial proceedings that were conducted *in camera* by the district court. The companion case is No. 86-3656, in which Storer Communications, Inc. and WJW-TV8 are the appellants (the Storer appeal), decided this date.

I.

A.

Following the May 16, 1986 indictment of the defendants on charges of embezzling union funds, their case was assigned to United States District Judge Ann Aldrich by blind draw. John Climaco, the attorney for defendant Presser, wrote Judge Aldrich, suggesting that she recuse herself in view of a longstanding quarrel between Judge Aldrich and himself. Judge Aldrich did not comply with the request, but did refer it to the judge of the district court handling miscellaneous matters, Honorable George W. White. This procedure had been suggested by this court in an unpublished opinion in an unrelated case in which another of Climaco's clients had appealed Judge Aldrich's denial of a motion to disqualify herself.

On June 3 (all dates refer to 1986 unless otherwise indicated) John Climaco filed a motion under seal with Judge White to disqualify Judge Aldrich pursuant to 28 U.S.C. §§ 144 and 455. The motion requested that proceedings thereon be conducted *in camera*. The motion was accompanied by a memorandum in support and a motion that the memorandum be filed under seal. A similar motion and memorandum were filed by Michael Climaco on behalf of the defendant Anthony Hughes — also under seal. Mi-

chael Climaco is the brother of John Climaco and both are members of the same law firm. Following a hearing on June 4 Judge White filed a memorandum in which he found that Judge Aldrich should be disqualified "under the circumstances" and in view of the affidavits of Presser and Hughes alleging a lack of impartiality growing out of differences between the judge and their attorneys. On June 5 Judge White entered an order returning the case to the clerk of court for reassignment and deferring the matter of unsealing the record. The National Broadcasting Company and WKYC-TV3 (hereafter NBC) had filed an application the same date, June 5, to be permitted to secure copies of all the documents related to the disqualification issue.

B.

On June 13, attorneys for the Department of Justice filed a motion for inquiry concerning conflicts of interest faced by the attorneys for the three defendants. On June 16, Presser filed a motion to place the government's June 13 motion and accompanying documents under seal on the ground that they would generate additional prejudicial pretrial publicity. This motion and a supporting memorandum were also filed under seal. On June 20 NBC filed an application to receive copies of all documents related to the inquiry concerning conflicts of interest. On June 23 Judge White, to whom the case had now been assigned for trial, issued an order that all documents related to the inquiry would remain under seal until further order of court. Both Presser and Hughes filed memoranda under seal, in opposition to NBC's applications for access and Presser filed a motion, under seal, to place all documents related to the conflicts inquiry under seal.

The district court held a hearing in open court on June 26 at which the attorneys argued the legal issues raised by the various motions without discussing factual matters. At this hearing the attorney for the third defendant, Harold Friedman, also argued

in favor of keeping all records pertaining to the motion for disqualification and the inquiry into conflicts of interest under seal. At the conclusion of the hearing the court denied NBC's application for access. The court found that the sealed documents seeking the disqualification of Judge Aldrich related "to matters which are not relevant to the culpability of the within defendants," but that their disclosure might cause potential jurors to become biased against the defendants. The district court also denied NBC's application for access to the documents pertaining to the conflicts inquiry. The court again found that these materials have no bearing on the culpability of the defendants, but found further that their disclosure would make it "virtually impossible to impanel an impartial jury" and would create "far more than a 'reasonable probability of prejudice' to the defendants." The district court filed a memorandum and order on June 27, directing that all documents remain under seal, and providing that a transcript including all the materials in question would be made available for public inspection after the trial, when "the danger of prejudice will have passed."

C.

On July 3 NBC filed a motion for reconsideration of the rulings on both applications. The court held *in camera* hearings on July 10 and 11 on the conflicts issue and obtained waivers on the record from each defendant of any claim of prejudicial error arising out of conflicts of interest involving their attorneys. On July 22 the district court filed a memorandum and order denying NBC's motion for reconsideration. In its memorandum the court analyzed the Supreme Court's decision in *Press-Enterprise Co. v. Superior Court of California*, ___ U.S. ___, 106 S.Ct. 2735, decided June 30, 1986, and concluded that NBC had not satisfied a "two-pronged test" set forth by the Court to establish a qualified right of access to the principal materials sought. The order did release from seal NBC's applications, the memoranda and briefs in sup-

port and in opposition to the applications and various responses. What remained under seal were the defendants' motions to disqualify Judge Aldrich with all supporting documents, the government's motion for inquiry into conflicts with all supporting documents and the materials filed in response thereto by the defendants, and the transcripts of all *in camera* hearings and meetings.

The district court's July 22 memorandum concluded:

Because Presser is entitled to a fair trial, Presser's right to a fair trial supersedes the public's right of access, *Press-Enterprise Company v. Superior Court*, 464 U.S. 501 (1984); *Waller v. Georgia*, 467 U.S. 39 (1984), the publicity generated by the media has already created a high level of prejudicial pre-trial publicity such that there exists a "substantial probability" that Presser's right to fair trial will be prejudiced by further publicity generated in connection with the release of information regarding the disqualification of the Honorable Ann Aldrich and the pleading filed by the United States of America seeking a court inquiry into various alleged conflicts of interest, there exists no reasonable alternative to closure other than a release of such information and materials after the conclusion of the trial on the merits.

For the foregoing reasons and for the reasons stated in the Court's previous order, NBC and WKYC do not have a right of access to the information that they now seek by way of this motion for Reconsideration. The Motion for Reconsideration is DENIED.

D.

NBC filed a timely notice of appeal from the district court order formally sealing the various documents and from the orders denying its application for access and denying its motion for reconsideration. Although all of these orders are interlocutory with respect to the underlying case, we have jurisdiction of this appeal

pursuant to 28 U.S.C. § 1291. NBC was permitted to intervene in the district court, and the orders satisfy the "collateral order doctrine" set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *Application of The Herald Co.*, 734 F.2d 93, 96 (2d Cir. 1984).

II.

A.

This is not a prior restraint case. NBC is not restrained by the district court's order from publishing or broadcasting documents or information in its possession. Rather, the case concerns the right of the public and representatives of "the media" to have access to documents filed in a district court at the preliminary stages of a criminal prosecution. The Supreme Court has decided a number of cases dealing with the right of access since 1979. See *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court of California (Press Enterprise I)*, 464 U.S. 501 (1984); *Waller v Georgia*, 467 U.S. 39 (1984); *Press-Enterprise Co v. Superior Court of California (Press Enterprise II)*, ___U.S.___, 106 S. Ct. 2735 (1986). Some of these decisions involve the explicit Sixth Amendment guarantee of an open trial, which may be invoked only by a defendant, *Gannett*, 443 U.S. at 379-80, while others involve the right of the public to attend criminal trials and the right of representatives of the media to be present at such trials, as implied in the First Amendment. *Richmond Newspapers*, 448 U.S. at 580 ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press would be eviscerated.' *Branzburg, [v. Hayes]*, 408 U.S. at 681.") (Footnote omitted). This court recently affirmed its adherence to a policy of openness in judicial proceed-

ings. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1176-81 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

In *Press-Enterprise I* the Court held that the First Amendment guarantee of an open public trial extends to the jury selection process and found that an order closing the courtroom and sealing the entire transcript of voir dire proceedings infringed that right. In so ruling the Court held:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

464 U.S. at 510.

The Supreme Court dealt with the First Amendment right of access in preliminary criminal proceedings for the first time in *Press-Enterprise II*, (*Gannett* dealt with the Sixth Amendment right to an open suppression hearing; *Press-Enterprise I* appeared to treat jury selection as the beginning of the trial.) In *Press-Enterprise II* the Court identified two "complementary considerations" in determining whether there is a qualified right of access to preliminary criminal proceedings, and then prescribed the standards to be applied to a closure order if the threshold criteria are satisfied. The complementary considerations are whether there is "a tradition of accessibility" and whether public access "plays a significant positive role in the functioning of the particular process in question." 106 S.Ct. at 2740. There is a qualified right of public access if the particular preliminary proceeding "passes these tests of experience and logic." *Id.* 2741.

B.

The district court concluded that proceedings on a motion to disqualify a judge and on a motion to inquire into attorney conflicts of interest passed neither of the *Press-Enterprise II* tests. Despite this finding, the district court went on to hold that the defendants' right to a fair trial prevailed over any qualified right of access that might exist. This is a determination which the Supreme court described as one required in "limited circumstances" in which the right of an accused to a fair trial might be undermined by publicity. *Id.* at 2741. The Court further stated:

[T]he proceedings cannot be closed unless specific, on the record findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."

Id. at 2743. (Citation omitted). In further explication of the requirements for closure, the Supreme Court stated:

The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right [to a fair trial.] And any limitation "must be narrowly tailored to serve that interest." " *Press-Enterprise, supra*, 464 U.S. at 510, 104 S.Ct., at 824.

Id. at 2744.

III.

We will deal with the disqualification and conflicts issues separately, treating disqualification first.

A.

The defendants filed the motions and affidavits of bias against Judge Aldrich pursuant to 28 U.S.C. § 144 and referred therein to 28 U.S.C. § 455 which sets forth the circumstances under which a judge must disqualify himself. Section 144 neither provides nor

hints that the motion or affidavit should be sealed or that disqualification hearings should be closed. The fact that a judge is not required to give a reason for recusal is beside the point. Often judges recuse themselves *sua sponte*. In such a case there is no record; the judge withdraws for reasons that he or she considers sufficient. However, when a judge is disqualified as the result of an affidavit of bias, there is a record, and we believe the public is entitled to access. We know of no tradition that hearings on motions to disqualify for bias are closed and that all documents pertaining to such motions are sealed. To the contrary, such proceedings are usually held in open court, and even when the judge recuses himself, he usually puts a statement on the record disclaiming any bias and stating that he removes himself in order to permit the case to proceed without the distraction of a controversy related to the judge.

We have surveyed reported Sixth Circuit cases involving the disqualification of judges from 1924 to 1984 and have not found one in which the proceedings were closed or the record sealed. See *Saunders v. Piggly Wiggly Corp.*, 1 F.2d 582 (W. D. Tenn. 1924); *Crowder v. Conlan*, 740 F.2d 447 (6th Cir. 1984), and cases cited in annotation to 28 U.S.C. § 144. A case involving an attempt to disqualify a judge for alleged antipathy toward an attorney was decided on an open record in *Gilbert v. City of Little Rock, Ark.*, 722 F.2d 1390 (8th Cir. 1983). We believe there is clearly a tradition of accessibility to disqualification proceedings.

We also believe that disqualification proceedings pursuant to a motion of one or more parties satisfy the second *Press-Enterprise II* consideration — public access does play “a significant positive role” in such proceedings. As the court stated in *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983), quoting *United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982), “The first amendment right of access is, in part, founded on the societal interests in public awareness of, and its understanding and confidence in, the

judicial system." The background, experience, and associations of the judge are important factors in any trial. When a judge's impartiality is questioned it strengthens the judicial process for the public to be informed of how the issue is approached and decided.

We conclude that both threshold criteria were satisfied and that there is a qualified right of access to documents and records that pertain to a proceeding in which one or more parties seek to disqualify a judge for bias pursuant to 28 U.S.C. § 144. We emphasize that this ruling does not require a judge to make any record when he or she recuses *sua sponte*.

B.

The government's motion for an inquiry into attorney conflicts in interest was filed, at least in part, pursuant to Rule 44(c), Fed. R. Crim. P., which provides:

(c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Of the many decisions cited in the Notes of the Advisory Committee, only *United States v. Foster*, 469 F.2d 1 (1st Cir. 1972), suggests that inquiries into possible conflicts should be conducted as closed proceedings. In *Foster* the court stated:

There may be unusual circumstances where, to avoid the possibility of prejudicial disclosures to the prosecution, the

court may exercise its discretion to pursue the inquiry with defendants and their counsel on the record but in chambers.

Id. at 5. The reference to "unusual circumstances" indicates to us that in the ordinary case inquiries into conflicts of interest by attorneys should be held in open court, and that this is the traditional method of conducting such inquiries.

We also conclude that there is a significant positive role to be played by having such proceedings conducted in open court. From such proceedings the public is informed of the seriousness with which the Sixth Amendment right to counsel is treated and of the meticulous inquiries that are undertaken by the court to be certain that defendants understand their right to independent counsel with undivided loyalty to the client's cause.

Thus, as with the disqualification issue, we conclude that proceedings inquiring into conflicts of interest by attorneys meet and satisfy the requirements of a qualified First Amendment right of access. Although not "like a trial," in the sense of a preliminary hearing such as the court considered in *Press-Enterprise II*, both proceedings do require the court to make factual determinations and to apply settled legal principles in order to rule. In addition, resolution of the issues presented in both types of proceedings, has a significant bearing on all subsequent proceedings in a case, particularly on the trial itself.

IV.

A.

Having determined that there is a qualified right of access to the materials, our next inquiry is whether this case presents those "limited circumstances in which the right of the accused to a fair trial might be undermined by publicity." *Press Enterprise II*, 106 S.Ct. at 2741 (footnote omitted). The district court held that the materials submitted in both proceedings would engender public-

ity that would be prejudicial to the defendants' right to a fair trial. The court also stated that no alternative to sealing existed that would preserve the defendants' rights. We do not believe that the district court's findings satisfy the requirements set out in *Press-Enterprise II*. While the district court used the language of that opinion, it did so in a conclusory manner. It did not make "*specific findings . . . demonstrating that*" there was substantial probability that the defendants' right to a fair trial would be prejudiced by further publicity and that reasonable alternatives to closure cannot adequately protect that right. *Id* at 2743 (emphasis added). The conclusions that these are the conditions in this case are not supported by any specific findings "*demonstrating*" that this result would follow from unsealing the materials.

NBC urges us to conduct an independent appellate review since the entire record is before us. However, we believe the required findings should be made first by the district court, which has lived with this case for months and is familiar with all the issues. However, we do set forth some guidelines to be followed in making the determination.

B.

At the urging of Presser's attorney the district court appears to have concluded that all publicity is prejudicial to a defendant's right to a fair trial. This assumption is not tenable. As the Supreme Court emphasized in *Nebraska Press Ass'n v Stuart*, 427 U.S. 539, 56S (1976), "pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically in every kind of criminal case to an unfair trial." Few cases in recent years have attracted such massive media attention as the California prosecution of John DeLorean for alleged violation of federal narcotics laws. In response to the wide press coverage, during the pretrial period, the trial judge ordered all documents to be filed *in camera* and sealed. The Court of Appeals found that this order

violated the public's First Amendment right of access and ordered the records unsealed unless "sufficiently specific" findings were made on a "document-by-document basis." *Associated Press v. United States District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983). The media coverage, much of it negative, continued. It even included the broadcast of video tapes made by the government during its investigation of DeLorean. Yet, in the end, the jury acquitted this highly-publicized defendant.

It is significant that voir dire in some of the most widely covered criminal prosecutions has revealed the fact that many prospective jurors do not follow such news closely and that juries can be empanelled without inordinate difficulty. *E.g.*, *United States v. Myers*, 635 F.2d 945, 948 (2d Cir. 1980) (Abscam); *United States v. Mitchell*, 551 F.2d 1252, 1262 n.46 (D. C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (Watergate). As the court noted in a different Watergate prosecution, "[t]his may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less than fascinating to the public generally." *United States v. Haldeman*, 559 F.2d 31, 62-63 n.37 (D. C. Cir. 1976) (en banc).

In the present case the materials submitted in support of the motion to disqualify Judge Aldrich do not relate to the defendants in any way, much less do they bear on the guilt or innocence of the defendants on the charges in this case. These materials concern a longstanding public feud between Judge Aldrich and members of the law firm representing Presser and Hughes. Much of the material consists of press accounts of charges and counter-charges over a three-year period. It is difficult to see how a rehash of these materials will lead to the deprivation of the defendants' right to a fair trial. Any order continuing these materials under seal must be extremely narrowly tailored.

The materials related to the alleged attorney conflicts of interest present some different considerations. To the extent that these materials concern attorneys in the case rather than the defendants, they resemble those filed with the motion to disqualify Judge Aldrich. Insofar as the motion seeks to point out the danger of conflict and prejudice from dual representation, it calls for Rule 44(c) proceedings which should be unsealed. The materials contain nothing of a derogatory or unusual nature. Other materials submitted in connection with this inquiry appear to require closer scrutiny. The district court will reconsider these materials and if it concludes again that their unsealing will create publicity that has a substantial likelihood of prejudicing the defendants' right to a fair trial, it will make specific findings demonstrating why this is so and will enter an order tailored as narrowly as possible to avoid this result. In addition to demonstrating a substantial likelihood of prejudice, the findings must also demonstrate that no alternatives can adequately protect the right to a fair trial and that closure will be effective to achieve this protection. See *Associated Press v. United States District Court*, 705 F.2d at 1146; *United States v. Chagra*, 701 F.2d at 365.

V.

This court is keenly aware of the difficulties encountered by district judges in dealing with highly-publicized cases, and we have no desire to add to those difficulties. Judge White has displayed patience and extreme care in all aspects of this particular case. The work of judges is never easy when two constitutional protections come into conflict in a given case. In *Press-Enterprise II* the Supreme Court remarked on the necessity for all courts "to remember that these interests are not necessarily inconsistent. Plainly, the defendant has a right to a fair trial but, as we have repeatedly recognized, one of the important means of assuring a fair trial is that the process be open to neutral observers." 106 S.Ct. at 2740. We believe the standards defined by the Supreme

Court and applied by various courts of appeals, as noted herein, provide the necessary framework for reconciling conflicts between the First Amendment right of access and the Sixth Amendment guarantee of a fair trial.

Openness in judicial proceedings promotes public confidence in the courts. The Supreme Court has pointed out that openness has been a principle that accompanied the long evolution of proceedings culminating in the modern criminal trial. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 564-75. One feature of that evolution has been the increasing importance of pretrial proceedings. The Supreme Court has recognized that the importance of some pretrial proceedings dictates that the rule of openness not be confined to the actual trial. *Press-Enterprise II*. By extending the presumption of a right of access to the particular proceedings involved in this and the Storer appeal, and requiring strict compliance with the requirements for overcoming that presumption, we do no more than acknowledge the critical importance of a core ingredient of the American judicial system.

The orders appealed from are vacated, and the cause is remanded for further proceedings consistent with this opinion. The documents sealed by the district court will remain sealed until that court has an opportunity to carry out the remand in an expeditious manner.

RYAN, Circuit Judge, dissenting. In my judgment the court's conclusion that the public, including the media, has a first amendment constitutional "qualified right of access to [the] documents" in question in this case and the right to be present at the court's hearings on the motions to recuse Judge Aldrich and to inquire into the claims of attorney conflict of interest is mistaken. The language of the first amendment of the federal Constitution provides no such right, and no authoritative judicial construction of the Constitution cited by the court, or of which I am aware, suggests one.

In candor, I must confess that the court's precise holding is not entirely clear to me. It appears to announce two specific holdings in Part III, the dispositive part of the opinion:

1. That there is a first amendment "qualified right of access to *documents and records* that pertain to a proceeding in which one or more parties seek to *disqualify a judge for bias* pursuant to 28 U.S.C. § 144." Slip op. Part III A (emphasis added);

and,

2. That there is "a qualified First Amendment right of access" to "*proceedings inquiring into conflicts of interest by attorneys . . .*" Slip op. Part III B (emphasis added).

Thus, as to the motion to disqualify Judge Aldrich, the court specifically holds that NBC has a qualified first amendment constitutional right of access to the "documents and records," by which presumably is meant the motion papers, relating to the recusal request. But, before reaching that conclusion, the court states: "We believe there is clearly a tradition of accessibility to disqualification *proceedings*." (Emphasis added.) Then, in Part III B of its opinion, after addressing the motion concerning the alleged conflict of interest by the defense attorneys, the court spe-

cifically holds that, "as with the disqualification issue, we conclude that *proceedings* inquiring into conflicts of interest by attorneys meet and satisfy the requirements of a qualified First Amendment right of access." (Emphasis added.)

It may be that I read the court's specific holding too narrowly, and should recognize that the court has found a qualified first amendment right in the public, including the press, to read and obtain copies of all the motion papers in both the disqualification and the conflict of interest matters, and, in addition, to be present at the hearings, in open court, in which those motions are presented. I will assume that to be the court's holding, and from it, I dissent.

I.

The issue of NBC's claimed constitutional right to examine and copy the motion papers in support of both motions is, analytically, wholly distinct from the claim of a constitutional right to be present at the hearings at which those motions were presented and decided, or in lieu thereof, to have access to the hearing transcripts.¹ The former has to do with access to court documents, and the latter with the right to be present at proceedings held in open court. The court relies on the same precedential authority for both constitutional entitlements, however, and appears to treat the two subjects as constitutionally fungible.

In my view, nothing in the language of the first amendment of the United States Constitution, or in any authoritative interpretation of it of which I am aware, provides either that the motion papers involved here must be made available to the public, including the media, or that the public has a right to be present at

¹ Since the motion hearings, which were closed to the public, are now history, the claimed right of access to the "proceedings" must necessarily have reference to access to the verbatim transcript of the hearings.

hearings on such motions. Because they are separate issues, I shall address them separately, beginning with the appellant's claim of a constitutional right of access to the documents on file relating to the motions. I am satisfied it is appropriate to treat the claimed right of access to the motion papers in the two motions as one issue, since there is nothing in the substance of the motions or the relief sought that would distinguish them from one another for purposes of a constitutional right of access.

A.

Access to Documents

The court rests its conclusion primarily upon *Press-Enterprise Co. v. Superior Court of California*, 478 U.S.____, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (*Press-Enterprise II*). To put it plainly, that case has nothing to do with documents of any kind; it has to do with a claimed constitutional right to be present at a state preliminary hearing in a multiple murder case.² Moreover, as discussed in subpart B hereof, the case provides no authority for The National Broadcasting Company's (NBC) claimed right to attend the motion hearing in this case, or, alternatively, to have access to the transcript of the hearings.

In Part II A of its opinion, the court correctly states the first issue in this case:

"Rather, [this] case concerns the right of the public and representatives of 'the media' to have access to documents filed in a district court at the preliminary stages of a criminal prosecution."

² The Supreme Court was faced with the same situation that confronts us today. Because the preliminary hearing had been closed to the public, and a verbatim transcript made of the proceedings, the Supreme Court was required to decide whether there had been a public right of access to the hearing, and if so, enforce that right by ordering release to the public of the transcript of the hearing.

Slip. op. at 6. After citing the six leading Supreme Court decisions concerning the right of the press and public to be in attendance at various phases of criminal case proceedings³, and correctly recognizing that those cases deal with the right of the public and media to attend *criminal trials*, *Richmond Newspapers*, including the juror selection process, *Press-Enterprise I*, and a state murder case preliminary hearing, *Press-Enterprise II*, the court focuses upon *Press Enterprise II* and the two "complementary considerations" identified by Chief Justice Burger as comprising the test for determining, in that case, whether the press and public enjoyed a first amendment qualified right to attend the preliminary hearing:

1) "whether the place and process has historically been open to the press and general public," and 2) "whether public access plays a significant positive role in the functioning of the particular process in question."

92 L. Ed. 2d at 10. After declaring that it knows of "no tradition that hearings on motions to disqualify for bias are closed and that all documents pertaining to such motions are sealed," and that it believes that "there is clearly a tradition of accessibility to disqualification proceedings" (emphasis added), the majority announces its holding:

"We conclude that both threshold criteria were satisfied and that there is a qualified right to access to documents and records that pertain to a proceeding in which one or more parties seek to disqualify a judge for bias pursuant to 28 U.S.C. § 144."

Slip op. at 8-9 (emphasis added). Nowhere in the court's discussion of the cited Supreme Court cases, or elsewhere, is any analy-

³ See *Press-Enterprise Co. v. Superior Court of California (Press-Enterprise II)*, 478 U.S. ___, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise Co. v. Superior Court of California (Press Enterprise I)*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

sis undertaken concerning the stated issue: the "right of the public and . . . 'the media' to have access to *documents* filed in a district court at the preliminary stages of a criminal prosecution" (emphasis added), nor are any cases cited suggesting that such a right exists. Rather, from the premise that there is "clearly a tradition of accessibility to disqualification proceedings" (emphasis added), the court leaps to the conclusion that there is a first amendment qualified right of access to the materials and documents filed in connection with the motion. The Supreme Court has never held that there is a first amendment right of access to court documents and records, and has been explicit, that such a right of access, if it exists at all, is derived from the common law. *Nixon v. Warner Communications*, 435 U.S. 589, 597-99, 608-10 (1978).

"It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. . . .

"Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. . . .

"It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.

. . .

* * *

"Respondents argue that release of the tapes is required by both the First Amendment guarantee of freedom of the press and the Sixth Amendment guarantee of a public trial. Neither supports respondents' conclusion.

* * *

"The First Amendment generally grants the press no

right to information about a trial superior to that of the general public. 'Once beyond the confines of the courthouse, a news gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public.' [citations omitted].

* * *

[T]he guarantee of a public trial . . . confers no special benefit on the press. . . . *The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed. . . .*"

Id. at 597-99, 608-10 (footnotes omitted, emphasis added).

It is not as though it has never occurred to the Supreme Court that there is a very significant difference between a first amendment right of access to court documents such as pleadings, affidavits, exhibits, and motion papers, and a first amendment right to attend courtroom proceedings. If the Court's appreciation of that difference were not self-evident from its decisions, Justice Stevens has repeatedly brought the matter to his colleagues' attention, and as recently as *Press Enterprise II*. In his dissenting opinion in that case, and indeed, in his separate opinions in *Press-Enterprise I*, *Richmond Newspapers* and *Globe*, all cited by the court today, Justice Stevens discussed his long held belief that the press and public enjoy a first amendment right of access to all information in the possession of the government, including court records. But the Supreme Court has not been willing to go that far, and has been most circumspect in its language, limiting the public's constitutional right of access in criminal case litigation to a right to

attend criminal proceedings.⁴ The right, the court has said, is one to attend certain "places and process[es]" *Press-Enterprise II*, 92 L. Ed. 2d at 10. It has never held that the right is one of access to documents in the court record relating to those proceedings.

Nor has any case been found in which the Supreme Court has equated the right to attend criminal proceedings with the right to examine and copy court documents relating to those proceedings. Indeed, in the two most analogous cases touching the subject, the Court has held that the press has no first amendment right to inspect and copy parts of a judicial record. See *Seattle Times Co v Rhinehart*, 467 U.S. 20 (1984) *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). In *Seattle Times* the Court held that the press had no first amendment right to publish information generated through pretrial depositions and interrogatories, which had been filed in the court record and sealed under a protective order, even though the press was itself a party to the litigation. The Court observed: "to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court." *Seattle Times*, 467 U.S. at 33-34 n.19.

⁴ See e.g. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558 (1980) (Burger, C.J., plurality opinion) ("The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution."); *id.* at 575 ("In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."); *id.* at 597 (Brennen, J., concurring) ("Popular attendance at trials, in sum, substantially furthers the particular public purposes of that critical judicial proceeding. In that sense, public access is an indispensable element of the trial process itself.") (footnote omitted). In every case where the first amendment right of "access" to judicial proceedings has been considered, the Court has determined whether the place and process are traditionally open to the public. In every instance it is a proceeding, rather than the underlying documents, to which the Court held a right of access applies. See *Press-Enterprise II*, 92 L. Ed. 2d 1; *Waller v. Georgia*, 467 U.S. 39, 44 (1984); *Press-Enterprise I*, 464 U.S. 501; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

In *Nixon v. Warner Communications*, a broadcaster claimed a first amendment right of access to tape recordings of conversations recorded by President Nixon in his office, which were admitted into evidence and played aloud at the criminal trial of third persons. The press claimed a constitutional right to copy, broadcast and sell the tape recordings. The Court held that neither the sixth amendment right to a public trial — which is analogous to the first amendment right of the public to attend the trial — nor the first amendment guarantee of a free press reach the court's records and that there is no constitutional right in the public or the press to inspect and copy documents in the judicial record. 435 U.S. at 609-10. That right, the Court said, derives from the common law, not the Constitution.

Some courts have appeared to ignore or distinguish *Seattle Times* and *Nixon*, and have held that the first amendment right of access to criminal proceedings guarantees members of the media access to documents in the court's record that are relevant to those proceedings.⁵ Of course, in those cases, the proceedings were open, and here they were not.

⁵ See *United States v. Soussoudis (In re Washington Post Co.)*, 807 F.2d 383, 389-90 (4th Cir. 1986) (affidavits filed in connection with plea and sentencing hearings); *United States v. Smith*, 776 F.2d 1104 (3rd Cir. 1985) (bill of particulars); *CBS, Inc. v. United States District Court*, 765 F.2d 823 (9th Cir. 1985) (documents filed in a motion for reduction of sentence); *United States v. Peters*, 754 F.2d 753 (7th Cir. 1985) (documents admitted as evidence during pendency of trial); *In re Globe Newspaper Co.*, 729 F.2d 47 (1st Cir. 1984) (documents relating to bail proceeding); *Associated Press v. United States District Court*, 705 F.2d 1143 (9th Cir. 1983) (pretrial criminal documents in general); *United States v. Dorfman*, 550 F. Supp. 877 (N.D. 111. 1982) (documents admitted into evidence during pretrial suppression hearing).

Other circuits appear to have followed the apparent mandate of *Seattle Times* and *Nixon* and have recognized a first amendment right in the public to attend trials but not to obtain copies of documents — usually audio or video tapes — which were admitted into evidence.

Even if the decisions of those circuits finding a constitutional right of access to documents in the records of criminal cases were well-reasoned and persuasive, and to me they are not, this court is not free to follow them. We are bound to follow our own precedent as announced in *United States v. Beckham*, 789 F.2d 401 (6th Cir. 1986), in which this court held that the public enjoys no first amendment right to inspect and copy judicial records or documents — tape recordings, transcripts thereof, or business contracts — which had been admitted into evidence. Any such right, this court has said, rests in the common law.⁶

I hasten to emphasize that I recognize that *Seattle Times*, *Nixon* and *Beckham* are distinguishable on their facts. They are instructive, however, in that they reveal the Supreme Court's and this court's appreciation that there is an important difference, for purposes of first amendment analysis, between a qualified right to attend certain court proceedings and a right to examine and copy

⁶ In *Beckham*, this circuit noted that.

"The [Supreme] Court has discussed ... the media's and public's constitutional right to attend criminal trials [citations omitted] and has also discussed the common law basis for the right of access to tape-recordings admitted into evidence. [Citing *Nixon*].

"In *Richmond Newspapers*, the Court concluded that the right of the public and press to attend criminal trials is constitutionally guaranteed under the First and Fourteenth Amendments....

"It is fundamental that the public and the press have 'a right to be present' and the 'rights to speak and to publish concerning what takes place at a trial.' [Citation omitted].

court documents. They emphasize that the former is guaranteed by the first amendment and the latter, by the common-law.

Two propositions of importance emerge from all of this: 1) the Supreme Court authorities the court relies upon today in finding a first amendment right of access to the motion papers and the related court documents in this case, have nothing at all to say about a constitutional right of access to documents; they address instead, in every case cited, a qualified constitutional right to attend courtroom proceedings, and 2) the Supreme Court has carefully distinguished between a constitutional right of access to court documents, which it has rejected, and a first amendment right to attend courtroom proceedings, which it has recognized as a qualified right, enforceable in certain circumstances, and then only if carefully articulated threshold requirements are met.

* * *

"[I]t is indisputable that the Media was never denied its constitutionally guaranteed right to be present at the trial. It was given preferential seating. Tapes that the jury heard through earphones were broadcast in open court over loud speakers. No restrictions on attendance, note-taking or publication were imposed. [The court then discusses the *Nixon* case.]

* * *

"Applying the Court's reasoning in [*Nixon*] The Constitution requires that members of the public and the media have the opportunity to attend criminal trials and to report what they have observed. [Citation omitted].... If a right to copy the tapes and transcripts in this case exists, it must come from a source other than the Constitution."

Id. at 406-09. See also *id.* at 412-13.

I am satisfied that there is a strong common-law tradition in this country of public access to court records⁷ and certain courtroom proceedings. That has ordinarily meant the press and public should have access to court documents, and in some circumstances, the right to copy them. But that tradition is in the common law, not the Constitution.

Nothing in the history, the text, or in a century and more of Supreme Court interpretation of the Bill of Rights suggests that the common-law tradition of public access to court records has been enshrined in the first amendment. The constitutionalizing of the common-law tradition of access to pretrial motion papers is beyond this court's authority and today's effort to do so misapplies precedent and trivializes the first amendment.

B.

Access to the Proceedings

Press-Enterprise II, the principle basis for the court's conclusion that NBC has a first amendment qualified right to attend the motion hearings in this case, or as it turns out, to obtain a transcript of the hearings, is not authority for that conclusion, and, properly applied, commands the opposite conclusion.

To repeat, the Supreme Court declared in that case that the test for determining whether the public enjoys a qualified first amendment right to be present in a judicial proceeding in a criminal case

⁷ This common-law right has been traced back in American jurisprudence to *Ex part Drawbraugh*, 2 App. D.C. 404 (1894), quoted in *In re Knoxville News-Sentinel*, 723 F.2d 470, 474 (6th Cir. 1983); see also *United States v. Mitchell*, 551 F.2d 1252, 1257-60 (D.C. Cir. 1976), *rev'd sub nom. Nixon v. Warner Communications*, 435 U.S. 589 (1978). This right has its roots in the narrower English common-law right to public records in which one has a proprietary or other legally recognized interest. See *Mitchell*, 551 F.2d at 1257-60; *H. Cross The Peoples Right to Know*, 25 (1953); Project, 73 *Mich. L. Rev.* 971, 1179 (1975).

is twofold: 1) "[W]hether the place and process has historically been open to the press and general public." and 2) "[W]hether public access plays a significant positive role in the functioning of the particular process in question." Neither of the two elements of the test are new. They had been identified by the Supreme Court in several earlier cases as "complementary considerations" for determining whether there is a first amendment right to be present at criminal proceedings. In applying the test to the facts presented in *Richmond Newspapers* and *Globe*, both access to criminal trial cases, and *Press-Enterprise I*, a jury selection case, the court found a qualified constitutional right to attend those proceedings. In *Press-Enterprise II*, before deciding that the "complementary considerations" guaranteed access to a pretrial proceeding like California's preliminary hearing, the Court examined each consideration separately. A close look at the Court's rationale suggests why the opposite conclusion should be reached in this case.

The first of the two considerations, "whether the place and process has been historically open to the press and general public" is derived, the Court said, from the pre-constitutional history of open criminal case trials in "the days before the Norman Conquest," the earlier English tradition of public trials, and the practice in colonial days of public trials of the "town meeting" sort. The historic roots of that "tradition of accessibility" to criminal trials extends likewise, the Court said, to preliminary hearings "as conducted in California:"

"Long ago in the celebrated trial of Aaron Burr for treason . . . the probable cause hearing was held in the Hall of the House of Delegates in Virginia, the court room being too small to accommodate the crush of interested citizens. . . . From Burr until the present day, the near uniform practice of state and federal courts has been to conduct preliminary hearings in open court."

Thus, the Court concluded, like public criminal trials, the preliminary hearing "as conducted in California." has historically been open to the public.

After carefully analyzing the second of the two "complementary considerations," whether public access plays a significant role in the functioning of the California preliminary hearing, the court concluded that it does — and the reason it does, the Court said, is because

"the preliminary hearing is often the final and most important step in the criminal proceeding. . . . [and] in many cases provides 'the sole occasion for public observation of the criminal justice system.' "

and

"Criminal acts, especially certain violent crimes, provoke public concern, outrage, and hostility. 'When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions.' *Press-Enterprise I*, 464 U.S. at 509."

Id. at 12-13. Thus, said the Court, the complementary "considerations that led the Court to apply the First Amendment right of access to criminal trials in *Richmond Newspapers* and *Globe* and the selection of jurors in *Press-Enterprise I* lead us to conclude that the right of access applies to preliminary hearings as conducted in California." *Id.* at 11.

If there is anything that is clear from that statement, it is that neither of the "complementary considerations," taken separately or together, and nothing in the Court's analysis of them, remotely suggests their applicability to the procedural motions involved in this case. It is not only that the proceedings in *Press-Enterprise II* and this case are so substantially different, having distinctly different purposes, it is that the analytical basis for each of the Supreme Court's "complementary considerations" testing the con-

stitutional right of access, are wholly inapplicable to the motions in this case to recuse Judge Aldrich and to inquire into attorney conflicts

Nothing in the history of the criminal cases before the Norman Conquest, or the tradition of public trials in the courts of justice of England or the colonies, or the fact that Aaron Burr's probable cause hearing was held in the House of Delegates in Virginia to accommodate the crowds, and nothing in the tradition of open preliminary hearings in criminal cases in federal and state courts in this country, or in the Supreme Court's conclusion that criminal trials and preliminary hearings are sufficiently alike because both may be dispositive of the criminal charges, even remotely suggests a rationale for concluding that pretrial motions to recuse a judge and to inquire into potential attorney conflicts historically have been, or constitutionally must be, open.

The number and kind of preliminary procedural motions that can be invented and brought on for hearing by imaginative counsel specializing in the practice of criminal law today are limited only by the ingenuity of the practitioners. Experienced trial judges know that many such motions are often merely part of the preliminary ritual pretrial "fire dance" undertaken by imaginative advocates determined to psychologically condition the "environment" for maximum tactical advantage, when and if the case ever gets to trial. Such motions address a broad spectrum of purely administrative and procedural matters such as venue of the trial, continuances, advancement on the calendar, severance of parties or issues, discovery, courtroom security, substitution of counsel, and endless similar procedural matters including, in my judgment, motions for recusal of the trial judge and for inquiry into alleged attorney conflict. Such motion hearings have no bearing upon the substantive issues in the trial — the guilt or innocence of the accused — and carry with them no historic tradition of accessibility by the public; nor are they sufficiently "like the

criminal trial," to implicate the first amendment interests and values that assure access to criminal trials.

Other pretrial motions may bear so directly upon the issue of guilt or innocence as to be, in essence, part of the criminal trial itself. Such proceedings might include motions and evidentiary hearings to suppress evidence, to quash an indictment or other process, to exclude evidence, and the plethora of motions and hearings brought under Federal Rule of Evidence 104(a) in which the trial court makes preliminary factual determinations that condition the admissibility of evidence at trial. Such motions and hearings may, in reality, be a part of, or so nearly like the trial itself, as to implicate the "complementary considerations" discussed in *Press Enterprise II*: a "tradition of accessibility" and an important role of the public in their functioning. If so, there would be a qualified first amendment right of access. Those are not the kind of substantive issues that are involved in the pretrial motions in this case.

Understandably, the court cites no historical basis for public access to the proceedings in question here. It merely concludes that it "believe[s] the public is entitled to access" and it "know[s] of no tradition that hearings on motions to disqualify for bias are closed. . . ." There is, of course, a distinction of considerable substance between an existence of an historical basis for a "tradition of accessibility" to motion hearings of the kind here in question, and an unawareness of a tradition to the contrary.

II.

In my judgment, the motions to recuse Judge Aldrich and to inquire into the alleged attorney conflict of interest bear none of the indicia of any of the criteria established by the Supreme Court in *Press-Enterprise II* to warrant the conclusion that, like the California preliminary murder hearing in *Press-Enterprise II*, the public has a qualified first amendment right to be present.

Although there is a common-law tradition of access to the court's record, it is a tradition of openness that is subject to the court's control and may, in appropriate cases, be modified or suspended altogether in the court's discretion — a discretion reviewable only for abuse. Whether that discretion was abused in this case, is not before us. The district court never exercised its discretion in the matter.

I would affirm the decision of the trial court not because I agree with its resolution of the issues in this case, but because I am satisfied that there is no first amendment entitlement to access to the motion documents or to be present at the hearings on the motions. I would remand to the district court with instructions that the court make a discretionary determination whether to honor the public's presumptive common-law right of access to the motion documents that have been sealed.

ENTERED: 8/31/87

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

NO. 86-3656

**APPLICATION OF STORER COMMUNICATIONS, INC.;
WJW-TV8,**

Intervenors-Appellants.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

v.

**JACKIE PRESSER, HAROLD FRIEDMAN and
ANTHONY HUGHES,**

Defendants-Appellees.

**Before: LIVELY, Chief Judge; RYAN, Circuit Judge; and
JOINER, District Judge.**

J U D G M E N T

**ON APPEAL from the United States District Court for the
Northern District of Ohio.**

**THIS CAUSE came on to be heard on the record from the said
district court and was argued by counsel.**

**ON CONSIDERATION WHEREOF, It is now here ordered
and adjudged by this court that the judgment of the said district
court in this case be and the same is hereby vacated and the case is
remanded to the district court for further proceedings.**

No costs taxed.

ENTERED BY ORDER
OF THE COURT

John P. Hehman, Clerk

/s/ John P. Hehman

Clerk

Issued as Mandate: August 28, 1987

A True Copy.

COSTS: None Attest:

Filing fee \$

Printing \$

Total \$

/s/Garry McCarthy

Deputy Clerk

ENTERED: 8-31-87

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 86-3656
**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**APPLICATION OF STORER
COMMUNICATIONS, INC;
WJW-TV8**

Intervenors-Appellants,

**ON APPEAL from the
United States District
Court for the Northern
District of Ohio.**

**UNITED STATES OF AMERICA,
*Plaintiff-Appellee,***

v.

**JACKIE PRESSER, HAROLD
FRIEDMAN and ANTHONY
HUGHES,**

Defendants-Appellees.

Decided and Filed July 31, 1987

**Before: LIVELY, Chief Judge; RYAN, Circuit Judge; and
JOINER, District Judge.***

* The Honorable Charles W. Joiner, Senior Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

LIVELY, Chief Judge, delivered the opinion of the court. JOINER, Senior District Judge, (pp. 14-15) delivered a separate concurring opinion. RYAN, Circuit Judge, (pp. 16-20) delivered a separate opinion concurring in part and dissenting in part.

LIVELY, Chief Judge. This is one of two appeals now before this court arising from preliminary proceedings in the prosecution of Jackie Presser, the president, and two other officials of the Teamsters Union. Neither appeal involves matters directly related to the question of the guilt or innocence of the defendants. The appellants in both cases seek media access to the sealed records of certain pretrial proceedings that were conducted *in camera* by the district court. The companion case, decided this date, is No. 86-3735 in which the National Broadcasting Company, Inc. and WKYC-TV3 are the appellants (the NBC appeal).

I.

A.

The indictment, charging the defendants with embezzlement of union funds, was filed in the United States District Court for the Northern District of Ohio on May 16, 1986. The case was assigned by blind draw to District Judge Ann Aldrich. Following the disqualification of Judge Aldrich, which is dealt with in the NBC appeal, the case was returned to the clerk of court and assigned to District Judge John M. Manos on June 4. Judge Manos recused himself on June 17 and the case was reassigned to District Judge George W. White.

After the case was assigned to Judge White, Storer Communications, Inc. and WJW-TV8 (Storer) intervened and filed a motion to unseal all documents related to Judge Manos's recusal. Storer asserted that the government lawyers had gone to Judge Manos on June 16, without notice to defendants' counsel, and

had shown documents to Judge Manos which caused him to recuse himself. Storer sought access to all materials upon which Judge Manos based his recusal.

Judge White scheduled an *in camera* hearing for June 26 on the motions of NBC and Storer to unseal various materials, including those related to Judge Manos's recusal. On June 26 an attorney for the Department of Justice wrote the attorneys for the three defendants, advising them that the government had filed certain materials *in camera* and under seal with Judge White. The letter stated that the "filing" contained the materials which the government had furnished Judge Manos when he was assigned the case. The record shows that the government filed the materials on June 26 at 12:24 p.m. with a covering document styled "Submission of Arguably Producing Materials Under *Giglio v. United States*." In this court the government has expanded its argument to contend that the documents shown to Judge Manos were "arguably *Giglio-Brady*" materials.

This document, which was addressed to Judge White, stated that the credibility of Allen Friedman would be an issue in the Presser trial and that the government had an obligation to furnish evidence bearing on his credibility. This document urged the court to rule that the materials purportedly related to Allen Friedman's credibility need not be disclosed to the defendants. The document also stated that unless the court ordered it to do so, the government did not intend to furnish the materials involving Friedman to the defendants. Enclosed with the documents that had been shown to Judge Manos was the transcript of a grand jury proceeding held in Cleveland on December 7, 1983 at which Allen Friedman had testified. The covering document stated that this transcript was included "so that the court may judge the relevance or rather lack thereof, of the Allen Friedman assertions" detailed in the other materials. Allen Friedman's grand jury testimony dealt with events that occurred between 1966 and 1973, was

not exculpatory with respect to the charges against Presser and his codefendants, and did not mention Judge Manos.

B.

Confusion reigned at the June 26 hearing before Judge White. In addition to the government's *ex parte* meeting with Judge Manos on June 16, there had been a scheduled conference with Judge Manos on June 17. The government and all defendants were represented by counsel at that conference, at the conclusion of which Judge Manos announced his recusal. At the beginning of Judge White's hearing on June 26, it appeared that the court was not aware that there had been two meetings. What developed was that no court reporter had been present at either meeting with Judge Manos, and there were no record entries with respect to either meeting except for the order returning the case to the clerk for reassignment.

When it became clear that Storer's motion referred only to the materials presented to Judge Manos at the *ex parte* meeting on June 16, Judge White indicated that he did not believe the materials had been filed. In the order denying Storer's motion, Judge White wrote, "This court is not aware of any material relating to any alleged *ex parte* hearing held by Judge Manos and the court's file does not reflect the aforementioned material." In fact, according to the clerk's date-time stamp the government had filed that material at 12:24 p.m. on the date of the hearing. The hearing began at 1:00 p.m. on June 26 and Judge White's denial order was entered the following day. None of the government attorneys advised Judge White that the materials had been filed, and he appears to have based the conclusion that he lacked jurisdiction over Storer's motion on the assumption that the materials sought by Storer had never been placed in the district court's hands.

The confusion continued in this court. Approximately one week before the scheduled hearing on the Storer and NBC appeals, NBC made a motion in this court that its counsel, in preparation for oral argument, be permitted to examine materials in the file that had been sealed by Judge White. The court undertook to examine the sealed materials in order to respond to this motion. The district court had not made separate files with respect to the ancillary motions of NBC and Storer. As a result, all matters relating to their motions were placed in the record of the underlying criminal case, and two volumes of that record were transmitted to the court of appeals when NBC and Storer appealed the denial of their motions. All of the individually sealed materials appeared to be in volume 2 of the district court record, or in separate sealed cartons. The court left all of these materials under seal. Some of the parties had filed joint appendices and briefs under seal in this court, a practice the court does not permit. The court entered an order denying NBC's motion, but removing the seal from the portions of the district court record not separately sealed by the order of Judge White, and from the briefs. One volume of the joint appendix was left sealed because it contained a copy of a sealed transcript.

During oral argument of the Storer appeal, the court questioned counsel for the government regarding the whereabouts of the materials that had been submitted to Judge Manos on June 16, since they were not among the materials in volume 2 of the district court record or in the separate sealed cartons previously examined by the court. Counsel responded that she had not included the materials "in the sealed appendix," and offered to file them with the court under seal "tomorrow when I get back to Washington." Obviously, the Department of Justice's left hand did not know what its right hand was doing. As previously noted, the materials had been filed in the district court on June 26. They had been placed in a sealed envelope in volume I of the district court record and had been transmitted to the court of appeals.

The materials were in the records room of the court of appeals at the very time the government lawyer was advising the court that she would send them "tomorrow."

C.

The events described in Part I-B are not dispositive of this appeal. They are recited at length to illustrate the difficulties that may result from efforts to close court proceedings. Courts should operate in the open, except where closed hearings are essential to guarantee a fair trial or to protect the integrity of the judicial process. In this case, ultimately the entire district court record, including docket sheets, was transmitted to the court of appeals under seal. Sealed materials should be segregated and clearly identified when transmitting a record to the court of appeals. There must also be better communications within the Department of Justice. In the district court, government lawyers permitted Judge White to rule on the assumption that materials which were the subject of Storer's motion were not in the court's records, when they had been filed by the government on the very day of the hearing. On appeal, a government attorney represented to a panel of this court that the same materials were still not in the court's possession, when in fact the materials had been transmitted as part of the district court record.

II.

On appeal from denial of its motion for access to the "Manos materials," Storer argues that there is a presumption of openness in all judicial proceedings that should apply to recusal matters. It maintains that the public has a legitimate interest in knowing how a given case becomes the responsibility of a particular judge and a need to know if there are facts which disqualify a judge from hearing a case. Storer contends that the government engaged in blatant "judge-shopping" in inducing Judge Manos to recuse him-

self, and that the claim that its purpose was to obtain a ruling on "arguably *Giglio-Brady*" material is disingenuous.

The defendants assert that if the government did present *Giglio-Brady* materials to Judge Manos, the defendants would be entitled to have copies but the press has no right to discover them.

The government argues that there is no presumption of openness with respect to either recusal or *Giglio-Brady* materials. Traditionally, the government maintains, the courts have not opened proceedings involving recusal or proceedings seeking preliminary rulings on arguably *Giglio-Brady* materials. There is no absolute right for the public or press to have access to all preliminary proceedings in a criminal prosecution, the government argues, and Storer has not identified factors in this case which trigger a presumption of openness.

III.

A.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In *Giglio v. United States*, 405 U.S. 150 (1972), the Court applied the *Brady* doctrine to a situation where the prosecution withheld from the jury the fact that it had promised a key witness that he would not be prosecuted for his part in a crime if he testified against his companion. The Court found that this witness's credibility would be an issue, and the jury was entitled to know of the "deal." Therefore, it was a violation of due process to keep the jury in the dark when the defense sought to establish that there had been an agreement. *Id.* at 155.

In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court identified three different situations in which *Brady* applies. The Court described these situations and the various effects of a prosecutor's failure to disclose as follows:

1. The undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and the prosecution knew or should have known, that it was perjured. In these cases, the defendant's conviction will be set aside if there is any reasonable likelihood that the perjured testimony affected the verdict. *Id.* at 103.

2. The defense makes a pretrial request for specific evidence, which is withheld, and the evidence is material in the sense that it might have affected the outcome of the trial, with respect to either the guilt or innocence of the accused, or the issue of punishment. If the evidence is material to the single issue of punishment, then due process only requires a new trial on that issue. *Id.* at 104.

3. There is exculpatory information in the possession of the prosecution which is unknown to defense counsel, and defense counsel either makes no request or makes a general request for all exculpatory material or all "*Brady* material." If the defense discovers any evidence after trial that fits this third situation, and the omitted evidence creates a reasonable doubt that did not otherwise exist, then a motion for a new trial must be granted on due process grounds. *Id.* at 106-07.

B.

The government contends that it submitted the sealed materials to Judge Manos "in an excess of caution," seeking his determination of whether it was required to furnish copies to the defense. Several courts of appeals have approved the practice of prosecutors submitting possible *Brady* materials *in camera* to the trial court in order to obtain a pretrial determination of whether disclo-

sure is required. *E.g.*, *United States v. Tucker*, 773 F.2d 136, 141 (7th Cir. 1985) ("the government acted prudently, [in submitting reports of a government informant concerning other misdeeds of a defendant] since if had not submitted the documents for the judge's inspection it might have opened itself up to a later attack for violating the defendants' rights under" the *Brady* doctrine); *United States v. Dupuy*, 760 F.2d 1492, 1501 (9th Cir. 1985) (consultation with trial judge is "particularly appropriate" where government has legitimate reasons for preserving confidentiality of materials submitted); *United States v. Holmes*, 722 F.2d 37, 41 (4th Cir. 1983) (prosecutor has obligation to submit material to the trial court *in camera* if he has any doubt about whether it might be exculpatory).

Our examination of the materials submitted first to Judge Manos and later to Judge White reveals that they include no evidence of perjury and contain nothing exculpatory with respect to the charges against Presser or his co-defendants. There is even less basis for considering the materials to be covered by *Giglio*. Allen Friedman had already been convicted for accepting payments from a union as a "ghost" employee, and was awaiting sentencing when he gave a statement to the government. The fact that Friedman's credibility would be an issue at the Presser trial is beside the point. Every witness's credibility is an issue at trial, to a greater or lesser extent, and the jury is the judge of each witness's credibility. *Giglio* comes into play only when the prosecution withholds material information from the jury bearing directly on the credibility of a government witness. *Giglio* does not require, or permit, the prosecution to obtain a pretrial determination by the judge on the general credibility of its witnesses. The government's *Giglio* argument to this court is patently frivolous.

C.

Although our examination of the documents raises serious questions about the true reasons for presenting the sealed materials to Judge Manos, we accept the government's statement that it acted in an "excess of caution." Nevertheless, we do not approve the practice of government counsel in a criminal prosecution approaching the trial judge *ex parte* in any matter related to the pending case. Materials can be submitted to the court *in camera*, but defense counsel and the public should have notice of the *in camera* proceedings and an opportunity to seek and argue for an open hearing. The public has a legitimate interest in criminal proceedings, and this interest is thwarted by *ex parte* proceedings. Motions for closure of criminal proceedings, both before and during the trial, must be posted promptly on the docket sheet, thus giving notice to the public. When such motions are posted, media organizations may move to intervene for the purpose of contesting closure of hearings and the sealing of documents. See *United States v. Criden*, 675 F.2d 550, 555, 559 (3d Cir. 1982) (motions for closure of pretrial criminal proceedings must be docketed sufficiently in advance of hearing on or disposition of such motions to afford interested members of the public an opportunity to intervene and present their views). We have previously cited *Criden* with approval, *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 474 (6th Cir. 1983), and now adopt its formulation for providing notice and an opportunity for the public to present claims of First Amendment rights of access to pretrial criminal proceedings. The Second Circuit adopted the *Criden* requirements in *Application of the The Herald Company*, 734 F.2d 93, 102 (2d Cir. 1984). After giving defense counsel and media representatives an opportunity to be heard, the court can then proceed to consider the submitted materials *in camera* if that is required. *Ex parte* proceedings, particularly in criminal cases, are contrary to the most basic concepts of American justice and should not be per-

mitted except possibly in most extraordinary cases involving national security. This is not such a case.

A district court has no obligation to conduct a general *in camera* search of the prosecutor's files for *Brady* material. *United States v. Holmes*, 722 F.2d at 41. It is the duty of the prosecutor, not the court, to disclose exculpatory material. *United States v. Dupuy*, 760 F.2d at 1504 (Ferguson, J., concurring). However, when a prosecutor presents material to the court for a *Brady* determination, the court has an obligation to examine the material *in camera* and determine whether disclosure to the defense is required. *Id.* at 1503. Accordingly, upon remand, Judge White will examine the materials and make the required *Brady* determination. There is no *Giglio* issue in this case.

The district court clearly erred in holding that it had no jurisdiction to rule on Storer's motion. The underlying cases had been assigned to Judge White and, unbeknownst to him, the materials had been filed in the record along with the government's statement that they were arguably required to be provided to the defense. Upon remand, if the district court determines that the materials must be disclosed to the defense under *Brady* that determination will not dispose of the Storer motion. *Brady* requires disclosure of information to the defense, and does not speak to the question of public or media access.

IV.

A.

As the Supreme Court has repeatedly emphasized, there is a strong presumption of openness in criminal trials. *E.g.*, *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) (*Press-Enterprise I*); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). In *Press-Enterprise Co. v. Superior Court of California*, ___ U.S. ___, 106 S. Ct. 2735 (1986) (*Press-*

Enterprise II) the Supreme Court held that under the First Amendment there is a qualified right of public access to some preliminary proceedings in a criminal prosecution. Two "complementary considerations" determine the right of access to any particular proceeding: (1) "whether the place and process has historically been open to the press and general public," and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 2740 (citations omitted). If a particular proceeding passes these two tests "of experience and logic," the right of access which attaches is qualified, not absolute. *Id.* at 2741. If it is claimed that the right of an accused to a fair trial might be undermined by publicity, "the trial court must determine whether the situation is such that the rights of the accused override the qualified First Amendment right of access." *Id.* The Court described this process by quoting language from its earlier opinion in *Press-Enterprise I*:

"the presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." 464 U.S. at 510

It is clear that the district court did not consider either the two threshold questions or the ultimate question of access because of its erroneous conclusion that it lacked jurisdiction.

B.

In the NBC appeals we made a distinction between *sua sponte* recusals and situations where one or more parties seek a judge's disqualification. The record in the present case makes it clear that at least one reason for submitting the materials to Judge Manos at the June 16 *ex parte* meeting was to induce him to consider withdrawing. Thus his recusal cannot be considered to have resulted

from his own motion. In accordance with our holding in the NBC appeal we conclude that some of the materials are subject to a qualified right of access. This applies to all the submitted materials except the grand jury transcript, which was totally irrelevant either to Judge Manos's recusal or to the late-discovered *Brady* rationale for the June 16 meeting. Grand jury proceedings are not conducted in the open, and transcriptions of those proceedings are subject to a rule of secrecy. Rule 6(e)(2), Fed. R. Crim. P. The nature of a grand jury's work requires that its proceedings remain secret, *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979), except where the stringent requirements of Rule 6(e)(3), Fed. R. Crim. P., are satisfied. The grand jury transcript filed under seal by the government will remain under seal.

The remaining materials submitted to Judge Manos and subsequently to Judge White will be treated in accordance with the standards set forth today in the NBC appeals, and the district court will rule on Storer's application on the basis of specific findings with respect to the defendants' claim that disclosure of the materials will make it impossible for them to obtain a fair trial.

The orders appealed from by Storer are vacated, and the cause is remanded to the district court for further proceedings consistent with this opinion. No costs on appeal.

JOINER, Senior District Judge, concurring. I join Parts I, II, IIIA, IIIB, and IVA of the court's opinion. I also join Part IIIC, but only to the extent that it holds that the district court erred in concluding that it did not have the jurisdiction to make a *Brady* determination or to rule on Storer's motion. I write separately to note my disagreement with the court's conclusion that there is a qualified right of access to potential *Brady* materials presented for an *in camera* determination by the trial judge, or that there is a possibility that such a determination should be made at an open hearing.

In *Brady v Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court first established that the prosecution has a constitutional duty to provide favorable evidence to the accused upon request. In *United States v Agurs*, 427 U.S. 97, 106-107 (1976), the Court, recognizing the importance of this prosecution duty, held that *Brady* applies even when defense counsel makes no request for such evidence. As recognized in this court's opinion, given the obvious import of *Brady* disclosures, prosecutors often, "in excess of caution," seek the trial judge's determination of whether certain "borderline" evidence is *Brady* material, even though no request has been made by defense counsel. This procedure involves a prosecutor submitting the materials in question *ex parte* to the trial judge for an *in camera Brady* determination. A record is made of the *in camera* proceeding, but the record and the materials are immediately sealed after the determination is complete. This procedure is well established and serves an important purpose of aiding compliance with rules requiring disclosure of certain evidence to the defendant. It should be encouraged.

Given this procedure, I fail to see how this process can be considered "historically open" to the public, and as a result, the first consideration of *Press-Enterprise Co v. Superior Court of California*, ___U.S.___, 106 S. Ct. 2735, 2740 (1986) (*Press-Enterprise II*), is not satisfied, and there is no right of access.

Moreover, rather than public access playing a significant positive role in the functioning of the *Brady* process, public access will hamper this important procedure. Prosecutors will be less willing to exercise "an excess of caution" in seeking judicial *Brady* determinations if they believe that this material may be made public, and the confidentiality, which would no longer exist if the continuing disclosures to the trial judge were not made, and which is so critical to this process, would be destroyed. As such, the second consideration from *Press-Enterprise II*, is also not satisfied.

I suggest that the district court was in error in determining that it did not have jurisdiction over the *Brady* decision, and that it lacked jurisdiction to rule on the Storer motion. A motion had been filed to disclose material filed under seal; clearly, the district court had jurisdiction and it should have been exercised. But under the law as explained in *Press-Enterprise II*, the Storer motion should be denied on the merits as there is no public right of access to the materials, unless and until they are ordered disclosed to defendants as *Brady* material. In such case, the court should consider the matter in light of the standards enumerated today in the companion case to the instant case, *Application of NBC, Inc. and WKYC-TV3*, No. 86-3735. If the materials are not ordered disclosed to defendants, there is no public right of access. This is true whether or not a district judge determines to recuse himself. The reasons for that recusal need not be stated, and his action should not in any way alter the decision as to whether there is a public right of access to materials given to the judge for a *Brady* determination.

I would reverse the district court's determination that it did not have jurisdiction, and would direct that the *Brady* determination be made, and that judgment be entered in accordance with the standards set forth here as to whether Storer should have access to that material.

RYAN, Circuit Judge, concurring in part and dissenting in part.

If this were a case holding only that the district court erred in concluding that it was without jurisdiction to consider the request for relief by intervenor Storer Communications, Inc., I would concur and be done with it — but other conclusions seem to have been reached in Chief Judge Lively's lead opinion, and with several of them I do not agree.

The court appears to have concluded that the government's appearance *in camera* before Judge Manos was really for the purpose of inducing him to recuse himself. The government claims its purpose was not that at all, but was to obtain, "in an excess of caution," a ruling on possible *Brady/Giglio*¹ materials.

Storer says that asserted purpose is "disingenuous" and the real reason for submission of the documents to Judge Manos was to induce him to recuse himself — a blatant exercise in "judge shopping."

The Chief Judge concludes that "[t]here is no *Giglio* issue in this case," that "[t]he government's *Giglio* argument to this court is patently frivolous," and that "our examination of the documents raises serious questions about the true reasons for presenting the sealed materials to Judge Manos." While entirely respectful of the Chief Judge's point of view, I do not share those views, or join in those conclusions.

The record shows that in approaching Judge Manos, the government sought a hearing to obtain a ruling whether certain materials in its possession had to be turned over to the defendants. That process has become widely known as an "*in camera*" *Brady*

¹ *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

hearing. The government has called it a *Brady/Giglio* determination. I find nothing sinister or disingenuous in that. The fact that Judge Manos, after evaluating the material, chose to recuse himself, does not somehow retroactively convert the proceeding before him into a recusal motion or constitute "judge shopping."

In *Press-Enterprise Co. v. Superior Court of California*, 478 U.S.____, 92 L. Ed. 2d 1 (1986) (*Press-Enterprise II*) the Supreme Court posited that the first of two "complementary considerations" that test whether the press enjoys a first amendment qualified right of access to judicial proceedings, is whether the "place and process" has historically been open to the public. As Judge Joiner has pointed out in his separate opinion, the "place" at which material is submitted to the court for a *Brady* determination has historically been closed to the press and public because the process has historically been conducted "*in camera*." Thus, it is even more self-evident in this case than it was in the companion case, *United States v. Jackie Presser (Application of National Broadcasting Company)*, that the *Press-Enterprise II* test for determining a qualified first amendment right of access to judicial proceedings is unmet.

In addition, *Press-Enterprise II* is no authority for the conclusion that the general public, including Storer, has a constitutional right of access to the materials submitted to Judge Manos. As I indicate in my dissenting opinion in the companion NBC case, *Press-Enterprise II* has nothing to do with court documents.

Moreover, materials submitted to the trial court for a *Brady* or *Brady/Giglio* determination are potential discovery materials. If a trial court rules that such materials must be disclosed to the defendant, they thereby become discovery materials and the defendant has a right to them — but the public and press do not. The Supreme Court has been very clear that there is no first amendment right of access, qualified or otherwise, to discovery materi-

als. See *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), in which the Court stated:

“[Discovery is] not [a] public component[] of a ...trial.... Much of the information that surfaces ... may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.”

Id at 33.

To be sure, the Chief Judge does not hold that a properly conducted *Brady* determination proceeding is completely open to public access. He appears to agree that it is not, but would require that new procedural steps be taken to alert the press and public when a *Brady* submission is about to be made to a trial court. However, in Part IV of his opinion, my brother appears to treat the material submitted to Judge Manos in this case not as *Brady* material, but as documentation intended to induce Judge Manos to recuse himself. Having thus concluded that the government's submission was really a recusal request, the Chief Judge would order the district court, upon remand, to treat the material “in accordance with the standards set forth today in NBC”

In my judgment, the proceeding before Judge Manos was not a recusal request and there is nothing other than suspicion, speculation and Storer's argument to suggest it was. It was a *Brady* determination proceeding, just as the record before us shows it was. Storer had no constitutional right to be present at the proceeding or have access to the materials submitted to the court “*in camera*.” With all due respect, I am unable to share my brother's suspicion of the motive of the government attorneys in this case, or the good faith of their representations to this court. Plainly, there was confusion. The government attorneys who responded to the court's questions at oral argument were not the same government attorneys who made the submission to Judge Manos. Had the

government attorneys had any reasonable basis whatever to anticipate that a routine *Brady* submission would be challenged by the media as an unconstitutional deprivation of first amendment rights, they might have made a better record and communicated among themselves, and with this court, more clearly. That they did not has resulted in some confusion, but not, in my judgment, any deception.

Finally, while I subscribe to my brother Joiner's dissent from the idea that either the "*in camera*" *Brady* determination hearing, or the documents submitted for consideration are subject to a first amendment right of access, I am unable to agree with him that, should the district court upon remand decide that the materials submitted to Judge Manos are discoverable under *Brady* or *Giglio* the media would enjoy a first amendment right of access to them. The mere fact that an *in camera* determination may result in a ruling that the submitted material is discoverable under *Brady* does not somehow constitute the "place and process" at which the determination was made an historically open proceeding. See *Press-Enterprise II*, 478 U.S. at ___, 92 L. Ed. 2d at 10.

Today's effort by the media in the companion NBC case and this case to find in the first amendment a constitutional right of access to information it could not turn up on its own — information generated in connection with proceedings never historically open to the public and light years distant from the criminal trial itself — should fail because there is no justification for it in the language of the first amendment or any authoritative interpretation of it. The first amendment guarantees to the press and broadcast media a qualified right to publish information it possesses, not the constitutional right to demand revelation of information it does not.

Plainly, the district court erred in concluding that it had no jurisdiction to entertain Storer's request. We should reverse and remand: but with what instructions?

When a claim to a constitutional right of access to court documents and proceedings is made, and the claim has no merit, as in this case, the district court should, if it closes the proceedings and seals the documents, make specific findings of fact and conclusions of law in order to permit a reviewing court to determine whether the order closing the proceedings and sealing the documents was a sound exercise of the court's discretion — a discretion to be disturbed only for abuse. Because the district court determined it had no jurisdiction to consider Storer's application in this case, it made no such findings and conclusions.

In candor, I must acknowledge that it was not possible for me to address the issues raised by the parties and addressed by my colleagues, without expressing my understanding that it has long been the nearly universal practice in federal district courts to conduct *Brady* determination hearings *in camera*. That history, and the justification for it, as explained by Judge Joiner, suggests to me that district courts generally do not abuse their discretion in closing *Brady* determination hearings to the general public and the press.

Nevertheless, I would remand the case to the district court for a determination of whether Storer has a common-law right of access to the materials submitted to Judge Manos. It is my understanding that no verbatim transcript of the proceedings was made, thus precluding any question about the right of access to the record of the earlier proceeding.

ENTERED: 8/31/87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA
Plaintiff

vs.

JACKIE PRESSER, et al
Defendants

CASE NO. CR86-114
JUDGE GEORGE W.
WHITE

MEMORANDUM
AND ORDER

This matter is before the Court upon defendant's motion to prohibit the government from calling Allen Friedman as a witness at trial. The basis of this motion is defendant's belief that given the circumstances surrounding the investigation of the case, the government's request to depose Allen Friedman and the timing of the subpoena, it is reasonable to conclude that the sole or dominant purpose of the government in issuing the subpoena under review was to investigate matters relating to the indictment.

It is well recognized that a federal grand jury may not be used to conduct discovery in a pending criminal case. *United States v. Doss*, 563 F.2d 458 (6th Cir. 1976). Therefore, the key issue in this matter is whether the government is using the federal grand jury for the purpose of preparing the pending indictment for trial.

In *United States v. Woods*, 544 F.2d 242, (6th Cir. 1976), the Court held that "A presumption of regularity attaches to grand jury's proceedings and the appellants have the burden of demonstrating that an irregularity occurred." See, e.g., *United States v. Battista*, 646 F.2d 237 (6th Cir. 1981).

After careful review, this Court finds that the Sixth Circuit's decision in *Woods* is binding upon this Court. Utilizing the *Woods*

burden of proof standard to the facts of this case this Court finds that unproven suspicions and assertions are insufficient to overcome the presumption of regularity. Accordingly, defendant's motion to prohibit the government from calling Allen Friedman as a witness at trial is Hereby Denied.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. District Court

ENTERED: 9/4/87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al

Defendants

CASE NO. CR86-114

MEMORANDUM
AND ORDER

This matter is before the Court, upon the government's motion for reconsideration of the Court's order of August 21, 1987 requiring disclosure of impeachment materials. This motion is granted in part.

At the bottom of page two beginning with the last paragraph, the first sentence shall be modified to read as follows: "In addressing the issue of the timing of disclosure, this Court finds that any and all impeachment material in the possession of the prosecution which tends to negate guilt, is to be turned over to the defense forthwith."

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. District Court

ENTERED: 9/4/87

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA
Plaintiff

-v-

JACKIE PRESSER, ET AL.
Defendants

**CASE NO. CR86-114
JUDGE GEORGE W.
WHITE**

**MOTION OF DEFENDANTS TO POSTPONE THE
DEPOSITION OF ALLEN FRIEDMAN UNTIL SUCH
TIME AS THE GOVERNMENT COMPLIES WITH
THIS COURT'S ORDERS OF MARCH 19, 1987
AND AUGUST 21, 1987**

The Government filed a motion with the Court seeking an order permitting it to take the deposition of Allen Friedman, and thereby preserve his testimony for trial. Defendants opposed the granting of that motion for a variety of reasons.

On August 21, 1987, the Court granted the Government's Motion.

On September 10, 1987, counsel for defendants Presser and Hughes received a Notice of Deposition from the Government

**MOTION DENIED.
IT IS SO ORDERED.**

JUDGE /s/George W. White

ENTERED: 9/15/87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

CASE NO. CR86-114

ORDER

vs.

JACKIE PRESSER, et al

Defendant

On April 28, 1987 the United States of America, through its undersigned attorneys, moved the Court for permission to depose Allen Friedman on videotape before trial by virtue of Rule 15 of the Federal Rules of Criminal Procedure, which provides that the testimony of a prospective witness may be taken and preserved for trial "whenever due to exceptional circumstances of the case it is in the interest of justice."

The basis of the government's motion is to preserve the testimony of Allen Friedman in light of the substantial possibility that he might suffer a fatal heart attack or become incapacitated before trial.

Depositions in criminal cases may only be used to preserve testimony; unlike civil matters, depositions in criminal cases are not discovery devices. See, e.g., *United States v. Hutching*, 751 F.2d 230, 236 (8th Cir. 1984), *cert. denied*, 106 S.Ct. 92 (1985).

In *United States v. Bronston*, 321 F.Supp. 1269 (SD New York, 1977), the Court held that the setting of conditions for the taking of a deposition are clearly within the trial courts discretion.

On August 21, 1987 this Court granted the government's motion to depose Allen Friedman with the restriction that the deposi-

tion must be taken within thirty days from the date of this order. Pursuant to the above-mentioned ruling it is further ordered that the government has been authorized to use the courtroom of United States District Judge George W. White on September 17, 1987 for the above-mentioned videotape.

Furthermore, it is ordered that this deposition will be closed to the public and only counsel for both sides, defendants, court reporter, and those persons necessary to operate the video equipment shall be permitted to be present at the deposition.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 9-15-87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA
Plaintiff

CASE NO. CR86-114
AMENDED ORDER

vs.

JACKIE PRESSER, et al.
Defendant

On September 15, 1987 this Court issued an order specifying the date and conditions of the government's deposition of Allen Friedman. In that order the Court stated, inter alia, that the deposition was to be closed to the public with only specified persons allowed to be present.

This amendment adds to that list of authorized persons as follows:

Counsel for the witness Allen Friedman may be present at the deposition.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 9/17/87

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACKIE PRESSER, et al.,

Defendants.

CASE NO. CR86-114

Judge George W.

White

REQUEST FOR HEARING

Witness Allen Friedman has filed two substantive motions this date:

1. Motion of Allen Friedman to Quash Subpoena, and to Vacate this Court's Order of August 21, 1987, Requiring the Witness to Submit to a Videotape Deposition
2. Motion of Witness Allen Friedman for an Order Requiring Videotaped Testimony to be conducted in Judicial Proceedings Open to the Public and Press

Given the significance of the motions, it is strongly urged by counsel that this Court schedule these matters for hearing on September 29, 1987, along with those items the Court will consider in this case on that date.

Respectfully submitted,

/s/ ROBERT S. CATZ

ROBERT S. CATZ

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Counsel for Allen Friedman

REQUEST DENIED.
IT IS SO ORDERED.

Counsel for Allen Friedman

JUDGE /s/George W. White

ENTERED: 9/17/87

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES,

Plaintiff,

vs.

JACKIE PRESSER, et. al,

Defendants.

No. CR 86-114

Judge White

**ORAL HEARING
REQUESTED**

**MOTION OF ALLEN FRIEDMAN TO QUASH
SUBPOENA, AND TO VACATE THIS COURT'S
ORDER OF AUGUST 21, 1987, REQUIRING
THE WITNESS TO SUBMIT TO A
VIDEOTAPE DEPOSITION.**

Witness Allen Friedman, hereby moves the Court for an order quashing the subpoena issued in this case directing his videotape deposition scheduled to be taken September 17, 1987, as authorized by this Court's order of August 21, 1987.

The reasons in support of this motion are presented in the memorandum in support that follows.

Respectfully submitted,

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Counsel for Allen Friedman

**MOTION DENIED.
IT IS SO ORDERED.**

JUDGE /s/George W. White

ENTERED: 9/17/87

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JACKIE PRESSER, et al,
Defendants.

CASE NO. CR 86-114

**JUDGE GEORGE W.
WHITE**

**ORAL ARGUMENT
REQUESTED**

**MOTION OF WITNESS ALLEN FRIEDMAN FOR AN
ORDER REQUIRING VIDEOTAPED TESTIMONY
TO BE CONDUCTED IN JUDICIAL PROCEEDINGS
OPEN TO THE PUBLIC AND PRESS**

Witness Allen Friedman hereby moves this Court for an order requiring that any videotaped testimony that he may be required to give in this case as set forth in this Court's order of August 21, 1987 be conducted in proceedings open to the public and press. Closed proceedings of Friedman's testimony is now scheduled for September 17, 1987.

The reasons this motion should be granted are fully set forth in the accompanying memorandum of law.

Respectfully submitted,

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Counsel for Allen Friedman

MOTION DENIED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 9/17/87

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

-v-

JACKIE PRESSER, ET AL.

Defendants

CASE NO. CR 86-114

**JUDGE GEORGE W.
WHITE**

**MOTION BY DEFENDANTS JACKIE PRESSER,
HAROLD FRIEDMAN AND ANTHONY HUGHES
FOR RECONSIDERATION OF THIS COURT'S
ORDER OF AUGUST 21, 1987 DENYING
DEFENDANTS' MOTION TO DISMISS ON GROUNDS
THAT GOVERNMENT GENERATED
PRE-INDICTMENT PUBLICITY PREJUDICED
THE GRAND JURY**

Defendants respectfully request this Court to reconsider its August 21, 1987 Order overruling defendants' Motion to Dismiss the indictment on the grounds that Government generated pre-indictment publicity prejudiced the Grand Jury.

This Court has scheduled an evidentiary hearing for September 29, 1987 to determine the parties responsible for violations of Federal Rule of Criminal Procedure 6(a) and possible sanctions. Additionally, the following Motions filed by Defendants:

A-176

**MOTION DENIED.
IT IS SO ORDERED.**

JUDGE /s/George W. White

ENTERED: 9/22/87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA
Plaintiff

vs.

JACKIE PRESSER, et al
Defendants

CASE NO. CR86-114

HON. GEORGE W.
WHITE

MEMORANDUM
AND
ORDER

This motion is before the Court pursuant to the government's motion for a status call to clarify this Court's order of August 21, 1987. In its motion, the government requests clarification as to the specific nature of the evidentiary hearing ordered therein.

On August 21, 1987, this Court found that the defendants had made out a *prima facie* case supporting their allegations that grand jury secrecy rules had been violated. (Fed. Rules of Crim. Procedures, Rule 6(e)). A hearing to determine responsible parties and possible sanctions was thus ordered.

For purposes of clarity, it should be noted that the *prima facie* case finding was made as to only specific media articles presented in defendant's motion. Accordingly, the upcoming hearing will be limited to proof as to whether those specific media articles (to be identified at a future date) constitute a violation in fact of grand jury secrecy rules. Fed. Rules of Crim. Procedure, Rule 6(e), See *In Re Grand Jury Investigation* (Lance), 610 F.2d 202, 220-221 (5th Cir. 1980). Also in this regard, as this Court has found that defendants failed to make a *prima facie* showing for dismissal of the indictment, defendants will be prohibited from offering further proof on the dismissal issue. If, after such hearing, a violation is found to have occurred, an additional hearing may be held

to determine the nature of any sanctions to be imposed. See *U.S. v. Eisenberg*, 711 F.2d 959, 965-966 (1983). Finally, as the hearings will involve only proof as to past, specific dates of alleged grand jury secrecy violations and sanctions therefore, the upcoming hearing is found to be collateral to the underlying criminal trial proceedings.¹ As such, both the violation hearing and the ultimate sanctions hearing are deferred until after the conclusion of the criminal trial. Specific instructions as to the procedure for said hearings will be rendered at such future time as is appropriate.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 9-29-87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA
Plaintiff,

vs.

JACKIE PRESSER, et al.
Defendants.

CASE NO. CR86-114

HON. GEORGE W.
WHITE

MEMORANDUM
AND ORDER

This matter is before this Court upon the defendants' motion for release of records and testimony of all grand juries which conducted investigations and issued indictments in the above-entitled case. Defendants seek release of such grand jury records pursuant to Rule 6(e)(3)(c)(ii), Fed. Rules of Criminal Procedure which authorizes release by a court upon a showing that grounds may exist for a motion to dismiss the indictment for matters occurring before the Grand Jury. Defendants claim the government committed misconduct before the indicting grand jury so as to require dismissal in that it improperly presented hearsay evidence and summary witnesses and either failed to present exculpatory evidence or impermissibly denigrated the exculpatory evidence which it did present. Defendants seek release of the records of previous grand juries which investigated this case apparently in order to support these arguments.

In order to obtain the release of grand jury records, a defendant must make a strong showing of a "particularized need" for the disclosure. *U.S. v Sells Engineering, Inc.*, 463 U.S. 418, 443 (1983); *U.S. v. Short*, 671 F.2d 178, 184-186 (6th Cir.), *cert denied*, 457 U.S. 1119 (1982). *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 221 (1979). That need must then be bal-

anced against the public's strong interest in maintaining the secrecy of grand jury proceedings. Finally, any such disclosure request must be structured so as to cover only the material necessary to meet the need. *Id.* Such a showing must be made even where the grand jury whose transcripts are sought has concluded its operations. This is so as to protect the interest of both future grand jury witnesses and future trial witnesses. *Douglas Oil, supra*, 441 U.S. at 220-221.

Here, the particular need claimed by defendants is to use the grand jury records to dismiss the indictment for government misconduct before the grand jury. (Fed. Rules of Crim. Proced, Rule 6(e)(3)(c)(ii). To obtain such a dismissal defendants must show both prejudice to the indicting grand jury by such misconduct and the longstanding nature of such misconduct. *U.S. v. Griffith*, 756 F.2d 1244, 1249-50 (1985). Such a showing is necessary to support his claim of particularized need under Rule 6(e). *U.S. v. Lamoureux*, 711 F.2d 745, 747 (6th Cir. 1983).

In this regard, it is well-settled that there is a presumption of regularity which attaches to grand jury proceedings. The defendants bear a heavy burden in showing an irregularity therein. *U.S. v. Battista*, 646 F.2d 237, 242 (6th Cir.), *cert. denied*, 454 U.S. 1046 (1981). Mere speculation or conjecture is insufficient to overcome this presumption of regularity. *U.S. v. Lamoureux, supra*, 711 F.2d at 747; *U.S. v. Globe Chemical Co.*, 311 F.Supp 535, 536-537, (S.D. Ohio, 1969); *See U.S. v. Short*, 671 F.2d at 187.

Defendants have failed to meet this burden in the instant case as they offer no facts to support their allegations of misconduct before the grand jury. To the contrary, defendants allegations as to the improper presentation of evidence are based completely on supposition and conjecture. In fact, defendants admit that they need the grand jury records in order to ascertain whether government misconduct prejudicing the indicting grand jury ever oc-

curred. (Defendant's motion at 22-23). Such an argument for disclosure has been clearly rejected by the appellate court for the Sixth Circuit. *U.S. v. Lamoureux*, *supra* 711 F.2d at 747.¹ In addition, defendants make no showing that any such alleged government misconduct was longstanding in nature as is required by *Griffith* to support dismissal of an indictment.

As such, defendants have failed to show that grounds may exist for dismissal of the indictment based on misconduct before the grand jury. Rule 6(e)(3)(c)(ii), Fed. Rules of Crim. Proced. *U.S. v. Griffith*, *supra*, 256 F.2d at 1249-1250. Given this failure, defendants have not made a sufficient showing of the particularized need required for release of grand jury records. Fed. Rules of Crim. Proced., Rule 6(e)(3)(c)(ii), *U.S. v. Sells Engineering, Inc.*, *supra*, 463 U.S. at 443.

Where a particularized need has not been shown, there is clearly no need to consider the second and third elements of the Rule 6(e) test, ie, whether the request for disclosure is sufficiently narrowly tailored and whether the particular need in question outweighs the public's strong interest in the secrecy of grand jury records.

For the foregoing reasons, defendants' motion to disclosure based on alleged government misconduct before the indicting grand jury is denied.

¹ Further, even if defendants had presented sufficient facts to support their allegations, the law clearly supports the government's argument that the presentation of hearsay and summary evidence to the indicting grand jury was not improper. See *U.S. v. Lamoureux*, *supra* 211 F.2d at 747; *U.S. v. Short*, *supra*, 671 F.2d at 181. Nor is the failure of the government to present exculpatory evidence improper. See *U.S. v. Adamo*, 742 F.2d 927, 937 (6th Cir. 1984), *cert denied*, *sub nom. Freeman v. U.S.*, 105 S.Ct. 971 (1985).

Defendants appear to make separate request for the disclosure of other specific grand jury records citing a general discovery purpose as the particularized need therefore. (Defendant's motion at 26-28). This request appears to be made pursuant to Rule 6(e)(3)(c)(i), Fed. Rules of Criminal Procedures which allows release of grand jury records when so directed by a court preliminarily to or in connection with a judicial proceeding. (*Id.*). In this request defendants seek the release of 1) "the complete testimony of those witnesses who provided exculpatory testimony to the five grand juries", (*Brady* material) and 2) any grand jury proceedings ... which indicate all testimony, statements or other documents regarding statements of FBI agents McCann, Foran and Friedrich."

As to the first category of material, defendants state that this is material previously ordered disclosed by this Court pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Defendants' claim this previous order has not been complied with in that they, defendants are unable to determine, without further research into existing documents at their disposal, certain dates as to which the already disclosed exculpatory material refers. The government responds that it has properly complied and has released such grand jury records. (Government's response at 10). Defendants have not replied to said response.

Defendants general right to this type of material is authorized and protected by *Brady*. Defendants have, however, failed to show a compelling particularized need so as to require the disclosure of grand jury records in order to obtain this material. This is so because the remedy for a failure to comply with the *Brady* duty, ie, post trial appeal, is supplied by *Brady* itself. *U.S. v. Short, supra*, 671 F.2d at 187; *U.S. v. Swiatek*, 632 F.Supp 985, 989-990 (ND Ill. 1986). As such remedy already exists, no showing of the compelling, particularized need required by Rule 6(e) can be made. *See id.*

Further, in light of the government's response denying a failure to comply, the defendants have not made an adequate showing that compliance has not occurred. Additionally, it appears from defendants own argument that they may be able to cure any alleged omissions through perusal of existing records currently at their disposal. (Defendants' motion at 27). These factors also support the conclusion that defendants have not shown the compelling need required by Rule 6(e) for disclosure of grand jury material.

Again, as no particularized need has been shown there is no need to consider the second and third prongs of the Rule 6(e) release test. Defendants' motion for release of this second category of grand jury records, ie, those containing *Brady* material, is denied.

As to the third category of material, ie, the statement of the three named FBI agents, defendants completely fail to allege a particularized need for such disclosure. They make no mention as to how disclosure of such material will aid their defense or prevent injustice. As such, defendants have failed to carry their burden of proof. (Defendant's motion at 28). Even assuming such material is sought as *Brady* material, the above analysis applies negating a showing of particularized need. Thus, defendants have also failed to make the requisite particularized need showing for disclosure of this third category of grand jury materials. Defendants' motion for disclosure of these grand jury materials therefore is denied.

For the foregoing reasons, defendants motions for release of grand jury records are denied.

IT IS SO ORDERED.

/s/ George W. White

George W. White

A-184

U.S. DISTRICT JUDGE

ENTERED: 9-29-87

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al

Defendant

CASE NO. CR86-114

**HON. GEORGE W.
WHITE**

**MEMORANDUM
AND
ORDER**

This matter is before the Court pursuant to the government's motion to show cause why defense counsel should not be sanctioned for violating the local Rules of Court prohibiting certain types of pretrial publicity. Local Crim. Rule 5.01(3)(d)(f), Rules of the United States District Court, Northern District of Ohio.

A ruling on this motion is deferred until after the completion of the underlying criminal trial.

It should be noted in this regard that counsel for both the government and defendants are specifically advised of their duty to adhere to the proscriptions regarding pretrial publicity embodied in Local Criminal Rules, Rule 5.01 during the pendency of the instant proceedings.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 9-29-87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA
Plaintiff

vs.

JACKIE PRESSER, et al
Defendants

CASE NO. CR86-114

HON. GEORGE W.
WHITE

MEMORANDUM
AND
ORDER

This matter is before the Court on defendants' "Motion For Discovery Of Procedures And Information Relative To The Grand Juries That Heard Evidence Encompassed By The Charges In The Indictment." Defendants therein seek discovery in the form of interrogatories regarding various procedures followed during the above-entitled investigation and ultimate indictment.

Information concerning events occurring before the grand jury may be released only under certain circumstances. Fed. Rules of Crim. Pro., Rule 6(e)(3)(c). Specifically, defendants must show a particularized need for the disclosure which outweighs the public's strong interest in grand jury secrecy. *U.S. v. Sells Engineering, Inc.*, 463 U.S. 418, 443 (1983); *U.S. v. Short*, 671 F.2d 178, 184-186 (6th Cir.), *cert denied*, 457 U.S. 1119 (1982); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 221 (1979). Any such disclosure request must be structured so as to cover only the material necessary to meet the need. (*Id.*). The defense here seeks disclosure in order to support its motion to dismiss the indictment for alleged government misconduct. (Defense motion at 14). It must therefore set forth grounds upon which such dismissal may be granted in order to meet its burden of showing a particularized

need for disclosure. Fed. Rules of Crim. Pro, Rule 6(e)(3)(c)(ii); See *U.S. v. Short*, *supra*, 671 F.2d at 184-186. In showing grounds for such dismissal, the defense must show both that said misconduct prejudiced the indicting grand jury and that said misconduct is a longstanding or common problem in the district. See *U.S. v. Griffith*, 756 F.2d 1244, 1249-50 (6th Cir. 1985); *U.S. v. Lamoureux*, 711 F.2d 745, 747 (6th Cir. 1983).

In this regard, it is well-settled that there is a presumption of regularity which attaches to a grand jury proceeding. The defendants bear a heavy burden in overcoming that presumption. *U.S. v. Battista*, 646 F.2d 237, 242 (6th Cir.), *cert denied*, 454 U.S. 1046, (1981). Mere speculation or conjecture is insufficient to overcome this presumption. *U.S. v. Lamoureux*, *supra*, 711 F.2d at 747; *U.S. v. Globe Chemical Co.*, 311 F.Supp 535, 536-537 (SD Ohio, 1969); See *U.S. v. Short*, *supra*, 671 F.2d at 187.

Applying these standards to the instant motion, it is clear that defendants have failed to carry their burden. Defendants present no facts supporting their allegations that misconduct by the government in the presentation of the case resulted in prejudice to the grand jury. To the contrary they offer only speculation, supposition and conjecture. Additionally, defendants make no showing that any such misconduct is a longstanding problem in this district.¹ In so failing to set forth grounds for dismissal, defendants have failed to show a particularized need for disclosure of grand jury information. As such, the requirements of Rule 6(e)(3)(c)(ii) concerning release of grand jury materials have not been met.

¹ Defendants' argument supporting particularized need is found in its tandem Motion For Disclosure, Inspection And Release Of All Grand Jury Records And Testimony (filed April 30, 1987). Defendants' citation to said argument is found at page 14 of the instant motion.

For the foregoing reasons, the instant motion is hereby denied.
IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 9-29-87

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**APPLICANTS NATIONAL
BROADCASTING COMPANY,
INC. AND WKYC-TV 3,**

Intervenors.

**CASE NO. CR86-114
JUDGE GEORGE W.
WHITE**

**UNITED STATES OF AMERICA,
*Plaintiff.***

v.

**JACKIE PRESSER, et al.
*Defendants.***

**MOTION OF NATIONAL BROADCASTING
COMPANY, INC. AND WKYC-TV 3 FOR LEAVE TO
FILE A REPLY BRIEF**

Applicants, National Broadcasting Company, Inc. and WKYC-TV3 ("Applicants"), hereby respectfully move for leave to file a reply brief on or before October 28, 1987 in support of their Application for Access to Sealed Judicial Records and Transcripts (filed on September 28, 1987), in opposition to the Government's Response to the Application, and in opposition to Defendants' Proposed Findings of Fact and Conclusions of Law re the

July 10 conflicts hearing transcript and re Defendant Friedman's Motion for Disclosure. The Reply Brief is necessary to respond to the

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 10/28/87

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA
Plaintiff

CASE NO. CR86-114
JUDGE GEORGE W.
WHITE

-v-

JACKIE PRESSER, ET AL.
Defendants

**MOTION FOR STAY
ORAL HEARING REQUESTED**

Now come defendants Jackie Presser and Anthony Hughes and respectfully request that the Order of this Court dated November 24, 1987, unsealing Exhibit 'B' of Defendant Harold Friedman's Motion by Defendant Harold Friedman for Disclosure of Certain Statements of Co-Defendants Presser and Hughes, and Certain Files of Government and Law Enforcement Agencies be stayed pending the filing of a Motion for Reconsideration of said Order.

It is submitted that compelling reasons exist for denying public access to Exhibit 'B' and should this Exhibit be released there would be no remedy to correct the irreparable harm that would flow therefrom.

MOTION GRANTED.
IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 11/24/87

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA
Plaintiff

vs.

JACKIE PRESSER, et al.
Defendants

CASE NO. CR86-114

**HON. GEORGE W.
WHITE**

**MEMORANDUM
AND ORDER**

This question is before the Court pursuant to defendant Friedman's motion for disclosure of certain statements made by defendants Presser and Hughes during their roles as government informants and of all government files making use of these statements. Defendant Friedman also moved for an order sealing said disclosure motion as well as its attached Exhibits A and B. The motion for disclosure is opposed by the government. The motion to seal is joined by defendants Presser and Hughes. It is opposed by the government and by applicants for access NBC and WKYC-TV 3.

The first issue to be resolved is that of the need to seal the motion for disclosure. The public's first amendment right of access applies to a judicial proceeding, and to all documents filed in connection therewith, when there is a tradition of accessibility (or the equivalent) to such hearings or documents and when access to such documents plays a significant positive role in the functioning of the particular process in question. *Press-Enterprise Co. v. Superior Court*, 54 U.S.L.W. 4869, '06 S.Ct. 2735, (1986) ("Press II"); *Application of National Broadcasting Co. Inc. and WKYC-TV 3 (U.S. v. Presser)*; 828 F.2d 340 (6th Cir. 1987) ("Application of NBC").

The historical prong of the *Press II* test is satisfied in the instant case. The right of the public to inspect documents filed with the trial court in connection with pretrial proceedings is well-established. *In Re Knoxville News-Sentinel Company, Inc.*, 723 F.2d 470, 473-474 (6th Cir. 1983); *See also, Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177, N.6 (6th Cir. 1983); *U.S. v. Martin*, 746 F.2d 964, 968 (3rd Cir. 1984). Moreover, the Sixth Circuit Court of Appeals has recently stated that this right of access applies specifically to pretrial discovery. *Meyer Goldberg, Inc. of Lorain v. Fisher Foods*, 823 F.2d 159, 162 (6th Cir. 1987).

'As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying public access to the proceedings. [citation].' As we observed recently, both civil and criminal trials are presumptively open proceedings and open records are fundamental to our system of law. [citations].

Id. at 162-163. Thus, the public's right of access to discovery motions filed with the Court appears well established in the Sixth Circuit.

The significant positive role prong of the *Press II* test is also satisfied here. This Court's decision on the underlying motion for disclosure may ultimately effect the presentation of trial evidence in the instant case. When such determinations are made in an open and credible setting the public's understanding of and confidence in the judicial system is fostered. *Application of NBC*, 828 F.2d at 344-345; *See Associated Press v. U.S. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983). Thus, this Court finds that a significant positive role would be performed in the instant case by allowing public access to pretrial motions for discovery filed with the Court.

The satisfaction of the above two tests requires that a presumption of public access be applied in the instant case. The burden of justifying a sealing order therefore falls upon the party seeking closure. Specific and compelling reasons for sealing the documents must be offered to the Court. *Press-Enterprise Co., v. Superior Court*, 106 S.Ct. 2735, 2741 (1986) ("Press II"). Specifically, the Court must be able to conclude that an overriding and compelling countervailing interest supporting closure exists; that closure is essential to preserve that interest; that sealing will in fact protect that interest; that no alternatives to complete closure exist; and that the closure can be narrowly tailored to serve that interest. *Applications of NBC*, 828 F.2d at 346-347; and see *In Re Knoxville News-Sentinel*, *supra*, 723 F.2d at 475-477 (similar showing necessary to override common law right of access).

Defendants-Movants have submitted proposed findings of fact and conclusions of law in order to meet this burden. Therein, defendant-movants agree that the motion for disclosure itself and supporting Exhibit A should be unsealed. They seek the sealing only of Exhibit B. These proposed findings fail to satisfy the *Press-II* test in regard to Exhibit B in several respects. In particular, they fail to clearly specify which constitutional right is in danger, that closure is essential to and will actually protect that right and that no alternatives to complete closure exist. As such, no showing for closure has been made. Additionally, an independent review by this Court requires the conclusion that there exists no compelling need to seal Exhibit B. It contains information only as to the existence of an informant relationship between Presser and Hughes and the FBI. As this information has been stated publicly by counsel for defendant in the past, this Court fails to see how it might be perceived as highly confidential or damaging. The motion of defendant Friedman to seal the motion for disclosure is thus denied.

Next, the underlying motion for disclosure will be addressed. Movant Friedman seek the government's disclosure of certain statements made by defendants Presser and Hughes during the course of their informant relationship with the FBI. Movant also seeks disclosure of any FBI files in which such statements were used. As authority for such disclosure movant cites Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure and the *Brady* doctrine. (*Brady v. Maryland*, 373 U.S. 83 (1963).)

Neither authority supports movant's request. First, Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure mandated disclosure by the government only of statements made by the defendant himself. Rule 16(a)(1)(A), Federal Rules of Criminal Procedure; *U.S. v. Percevault*, 490 F.2d 126, 129-130; *U.S. v. Roberts*, 811 F.2d 257, 258-259; *U.S. v. Penix*, 516 F.Supp 248, 257 (W.D. Okla. 1981). As such, movant is not entitled to the requested material pursuant to Rule 16(a)(1)(A).

Nor is movant entitled to the material pursuant to *Brady*. The requested material apparently consists of detailed information given to the FBI by Press and Hughes concerning the activities of specific persons allegedly associated with organized crime and/or certain labor unions. The statements do not directly concern this case. Movant Friedman admittedly seeks them only to illustrate that Presser and Hughes provided information helpful to other FBI investigations thus allegedly giving the FBI a motive to authorize the hiring of illegal ghost employees by the Union. These ghosts would then provide further information to be turned over by the informants. Clearly, this potential evidence of motive is too attenuated to satisfy the *Brady* requirement of exculpatory material. *Brady v. Maryland*, *supra*, 373 U.S. 83. Additionally, in this regard, the prosecution states it had produced all *Brady* material of which it is aware and the currently requested material is not *Brady* material. Defendant's remedy for any error by the prosecution in making this determination may be pursued after the termi-

nation of the trial. *U.S. v. Short*, 671 F.2d 178, 187 (6th Cir.), *cert. denied*, 457 U.S. 1119 (1982). Thus, movant's request is not supported by the *Brady* doctrine.

As the Motion for Disclosure is supported by the neither Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure nor the *Brady* Doctrine it is denied. As previously noted, the motion to seal the underlying motion to disclose is also denied.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 11/24/87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al

Defendants

CASE NO. CR86-114

HON. GEORGE W.
WHITE

MEMORANDUM
AND ORDER

This matter is before the Court pursuant to the joint motion of defendants Jackie Presser, Harold Friedman and Anthony Hughes to suppress certain evidence seized as a result of the search of the Bakery Workers and Teamsters Union located 1870 East 19th Street, Cleveland, Ohio. As grounds for suppression Defendants-Movants (hereinafter defendants) allege the following: a) the search pursuant to the original warrant was overly broad thereby tainting the second warrant (which was based on information found during the execution of the first warrant); b) the initial warrant was tainted as it was based upon information obtained by informants acting as government agents; c) government agents executing the original warrant violated defendants Sixth Amendment right to counsel when they "seized" certain documents; d) the initial warrant was tainted as its supporting affidavit contained deliberate, misleading omissions; and e) the initial warrant was tainted as it was not supported by sufficient probable cause. Each ground will be separately addressed.

On October 7, 1982 the government searched the above-noted union offices pursuant to a search warrant. This search warrant authorized seizure of "Business Agent Call-In Sheets in the basic format as attached as Exhibit B and business agent rosters (time

and attendance reports) in the basic format as attached as Exhibit C through C-12 ... covering the period of January 1, 1977 through December 31, 1981 inclusive". This basic format consisted of charts, lists and graph-type documents.

During the execution of the warrant, the agents observed written documents other than those specifically described which appeared to be incriminating.¹ (Hereinafter referred to as group 2 documents). These documents were apparently gathered into one area while a warrant for their seizure was prepared and submitted to the magistrate. The Magistrate granted the warrant for seizure of five (Items A, B, C, D, and G) of the eight types of group 2 documents sought. It is undisputed that, of the group two documents, the agents physically seized only those authorized by the second warrant.

It must first be noted that only defendant Friedman and, to the extent seizure of group one items is being challenged, Defendant Presser, have standing to challenge this search. Only these two defendants maintained offices on the union premises in which they possessed a legitimate expectation of privacy. *Rakas v. Illinois*, 439 U.S. 128, 133, 138-140 (1976); *See U.S. v. Lefkowitz*, 618 F.2d 1313, 1316, N.2 (9th Cir.) *cert. denied*, 449 U.S. 824 (1980);

¹ /Item A — A wall-mounted flip chart listing meetings at which attendance was required; Item B — A list of business agent names with instructions for answering telephones for them including special instructions for Tony Hughes' calls. Found on credenza; Item C — Six looseleaf notebooks containing grievance reports. Found on credenza; Item D — File folder of yearly summaries of business agent time off work and attendance calendars. Found on credenza; Item E — photocopies of a court decision (dealing with prior ghost employee situations), union paychecks to previously identified ghost employees and a memo written by Attorney Rotatori of interview with Jack Nardi, found in file cabinet. Item F — Organizing reports found in file cabinets; Item G — Then current list of employees, including an alleged ghost, found in desk drawer; Item H — daily call-in sheets for business agents for 1982, found in file cabinet. (Government's Reply Brief, Exhibit C (Second Affidavit)).

Mancusi v. Deforte, 392 U.S. 364, 368 (1968); *U.S. v. Torch*, 609 F.2d 1088, 1091 (4th Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

Defendants first argue that the execution of the original warrant was overly broad making the seizure of the second group of documents illegal. Specifically, defendants argue that the original warrant authorized only the seizure of chart-like documents. They claim that the documents sought in the second warrant were not in the form of charts thus the agents exceeded the scope of the original warrant by viewing these documents any longer than was necessary to make that visual determination. This same reasoning, they argue, prevents satisfaction of the immediately apparent prong of the plain view doctrine.

No evidentiary hearing is necessary to the determination of this question as no factual issue has been raised. Rule 41(e), Federal Rules of Crim. Pro.; *Cohen v. U.S.*, 378 F.2d 751, 760 (9th Cir. 1967), *Matter of Searches and Seizures Conducted on October 2, 3, 1980*, 665 F.2d 775, 776 (7th Cir. 1981). An examination of the language of the initial warrant will reveal whether the seizure of documents other than charts was authorized.

After examining said warrant this court concludes that the searching agents were not restricted to viewing documents only for chart-like appearance. The warrant specifically allowed the seizure of documents "in the basic format of" specific charts, as well as of printed documents, ie, printed lists of names, containing reports on the attendance and time expended by business agents. Moreover, the warrant required only basic, ie, general, adherence to the exhibit format. The agents were thus allowed to search for printed documents which satisfied the verbal description set out in the warrant. The strict interpretation advanced by defendants is not required. See 2 LaFare, *Search & Seizure*, §4.11(c) at 34 (1987 2d. Ed.).

In so executing the initial warrant, the agents were authorized to seize pursuant to the plain view doctrine any documents inadvertently discovered whose incriminating nature was immediately apparent. See *Coolidge v. New Hampshire*, 91 S.Ct. 2022, 2037-40 (1971); *Sovereign News Co. v. U.S.*, 690 F.2d 569, 573 (6th Cir. 1982).

As noted, defendants disagree, arguing that the chart limitation per se prevented the criminal nature of any printed pages from being immediately apparent. As noted, the agents were not so limited by the initial warrant. Any printed documents which satisfied the requirements of the plain view doctrine were thus seizable. Defendants do not challenge the applicability of the plain view doctrine to the items seized in any other regard.² As such, no factual issue is raised and no hearing necessary. After a review of the briefs, this Court finds all group two items were properly seized pursuant to the plain view doctrine.

² /It should be noted that the defendants claim that illegal "seizures" of both the physically removed group #2 documents (items A, B, C, D, and G) and those not physically removed (items E, F, H) occurred. Specifically, they claim a seizure of items E, F, and H occurred when these documents were moved to a particular area within the union offices while the second warrant was being sought. They also apparently claim that item E (the photocopies of *U.S. v. Bane*, of Union paychecks, and of a memo describing an interview with alleged ghost Jack Nardi) was "seized" as it was memorized by a searching agent and communicated to a prosecutor. First, as to item E, this act does not constitute a seizure. In order to "seize" a tangible item such as this document, there must be a physical removal of it from defendant's possession. *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370 (1906); *LaFave, Search & Seizure* §2.1 at 299-301 (2d 1987). As no physical removal occurred here, no seizure occurred in the alleged memorizing. Second, as to the segregating the items, assuming arguendo this constitutes a seizure, (See *Sovereign News Co. v. U.S.*, 690 F.2d 569, 573 (6th Cir. 1982)), it was authorized under the plain view doctrine. (See text, *supra*). Again, defendants apparently do attack the applicability of the plain view doctrine to these items other than with the chart argument.

Defendants next claim the first warrant was tainted as the affiant used information obtained by two confidential informants who were acting as government agents when they looked through union files. They argue this constitutes an illegal, warrantless search by government agents.

The Fourth Amendment does not apply to searches and seizures conducted by private persons and which are not directed, encouraged or initiated by the government. See *U.S. v. Lambert*, 771 F.2d 83, 89 (6th Cir.), cert. denied, 106 S.Ct. 598 (1985). There is no Fourth Amendment violation where evidence gathered by a private person under such circumstances is voluntarily disclosed to the government. *Id.* In order for the Fourth Amendment to apply to this type of search the defendant must prove both that the government instigated the search or seizure and that the private person intended at the time of the search or seizure to assist the government. *Id.*

Defendants offer absolutely no facts to support their allegation that the confidential informants were acting for the government at the time of the searches in question. These completely speculative claims are insufficient to raise a factual issue. *Cohen v. U.S.*, 378 F.2d 751, 760-761. As such, no factual hearing is required. The request for hearing is denied.

For the the same reasons the motion to suppress on this ground fails as a matter of law. Defendants have failed to set forth any facts to satisfy the above-noted two-prong test. The motion to suppress on this ground is denied.

Defendants Presser and Friedman next claim that the searching agents violated their Sixth Amendment right to counsel by reading the documents contained in item E (the copies of *U.S. v. Bane*, of union paychecks and of a memo apparently written by Attorney Rotatori discussing his interview with Jack Nardi).

They seek a hearing and dismissal of the indictment or suppression of any evidence which resulted from this alleged reading.

This motion is denied as no Sixth Amendment right to counsel existed at the time of the search. As defendants admit, the law is well-settled that the constitutional right to counsel does not attach until adversary proceedings commence. *Sevier v. Turner*, 742 F.2d 262, 267 (6th Cir. 1984). Adversary criminal proceedings commence by way of formal charge, preliminary hearing, indictment, information or arraignment. *Moore v. Illinois*, 98 S.Ct. 458, 464 (1977), citing *Kirby v. Illinois*, 92 S.Ct. 1877. The search at issue occurred in October of 1982. Defendants were not indicted until almost four years later (May, 1986). Thus, no violation of the Sixth Amendment right to counsel occurred.³

Defendants also argue that their evidentiary privileges protecting attorney-client communications and attorney work product were violated by the alleged seizure of Item E.

The attorney-client privilege protects from disclosure communications, made in confidence, by a client in the course of seeking legal advice from an attorney. It does not protect all occurrences and conversations which have any bearing, direct or indirect, upon the relationship of the attorney with his client. *U.S. v. Goldfarb*, 328 F.2d 280, 281-282 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964). Specifically, this privilege does not protect information which an attorney secures from a witness while acting for his client in anticipation of litigation. *Hickman v. Taylor*, 67 S.Ct. 385, 392 (1947). This privilege is strictly construed to prevent unneces-

³ /It should also be noted that even assuming, arguendo, a Sixth Amendment violation had occurred, the only remedy would be suppression of the evidence seized. *U.S. v. Morrison*, 449 U.S. 361, 364-66, 101 S.Ct. 665, 668-669 (1981); *Bishop v. Rose*, 701 F.2d 1150, 1157 (6th Cir. 1983). Dismissal of the indictment is not appropriate even where an intentional violation occurred. *Morrison, Id.* Suppression, as previously discussed, would be unnecessary as no seizure of these items occurred here.

sary suppression of evidence. Defendants have the burden of proving each element of the privilege. *In re Grand Jury Investigation*, NO. 83-2-35, 723 F.2d 447, 451 (6th Cir. 1983).

Defendants have not presented sufficiently definite, detailed and clear allegations so as to require a hearing on the issue of whether this privilege applies to the subject documents. *Cohen v. U.S.*, 378 F.2d at 760-761. Specifically, defendants fail to allege that any of the item E documents contain information communicated by them to the attorney involved. Thus, no issue of fact as to the nature of the documents is presented. As such, a hearing is not necessary. The issue will be decided on the briefs.

According to the briefs, the memo is one written by Attorney Rotatori describing an interview which he had with Jack Nardi. There is no indication as to whom, if anyone, the memo originally was addressed. Additionally as previously noted, there are no facts showing that any of the Item E documents contain confidential information communicated to Attorney Rotatori by either defendant Friedman or Presser.⁴

Given these facts, the documents do not qualify as protected attorney-client communications. The motion to suppress on this ground is denied.

Finally, in this regard, defendants contend that two of the documents in Item E (the memo and the court case photocopy) constitute attorney work product and is thus subject to such evidentiary privilege. Defendants request suppression of any such privileged information actually seized. They also request that, us-

⁴ /It is for this reason that defendant's citation to *Coastal States Gas Corp. v. Department of Energy*, 614 F.2d 854 (D.C. Cir. 1980) does not alter this result. That case includes documents written by an attorney only where such contain, directly or by implication, information previously confided by the client. *Id.* at 862.

ing a "fruit of the poisonous tree" analysis, all evidence derived from such seizure be suppressed and that all references to Jack Nardi, Jr. be stricken from the case.

The work product privilege protects from disclosure the attorney's thought processes as reflected in written materials produced in preparation for trial. *Hickman v. Taylor*, 67 S.Ct. 385, 394 (1947); *U.S. v. Nobles*, 95 S.Ct. 2160, 2169-2170 (1975); *Coastal States*, 617 F.2d 864. This doctrine is evidentiary in nature and is normally invoked to prevent discovery or disclosure of such materials. *Id.*

Assuming, arguendo, the documents at issue (Item E) are work product,⁵ the remedy for a violation of that evidentiary privilege, is at most, the exclusion of such document from evidence at trial. As the documents containing these alleged work product notations have never been taken by the government, the notations cannot be offered as evidence, there are therefore no work product notations to exclude pursuant to this privilege.⁶

Additionally, this court declines defendants' invitation to apply a constitutional "fruit of the poisonous tree" analysis to this situation. Such analysis is not appropriate to the violation of an eviden-

⁵ /Defendants have alleged that the document contained work product (a legal conclusion) as well as "thoughts and evaluative processes" which "implicitly include keys to defense strategy...". The government apparently does not dispute this factual statement. As there is thus no factual issue presented a hearing is not necessary on this issue.

⁶ /The underlying content of the documents, i.e., the Nardi interview itself and the court case photocopy would not be subject to exclusion under this doctrine. The government was free to obtain any such information through its own resources. Additionally, upon a proper showing, i.e., (substantial need and undue hardship in otherwise obtaining these underlying materials), court ordered disclosure of such would be possible under the rules. *Coastal States, id.* 617 F.2d 864, citing Fed. R. Civ. P. 26(b)(3)(A). Finally, it should be noted that defendants have not alleged that the union paycheck copies (part of the Item E category) constituted either Attorney-client communications or work product.

tiary privilege. See Rule 501, Fed. R. of Evid. (rules of privilege are governed by the common law). Moreover, as described above, no unconstitutional search or seizure of these documents has occurred. As such, no taint analysis is necessary. The motion on this ground is denied.

As their fourth claim, defendants argue that the affiant for the first and second search warrants deliberately omitted facts on six occasions from the affidavits which resulted in the Magistrate being misled as to the existence of probable cause. The government refutes this claim.

The law is clear on this issue. Where a defendant 1) makes a substantial showing that an omission of material fact has been deliberately or recklessly made in an affidavit for a search warrant and 2) if the addition of that omitted fact negates the original finding of probable cause then the Fourth Amendment requires a hearing upon defendants request. *Franks v. Delaware*, 98 S.Ct. 2674, 2684 (1978); *U.S. v. Stanert*, 762 F.2d 775, 781 (9th Cir.), modified on other grounds, 769 F.2d 1410 (1985). In order to obtain a hearing the defendant must support the above allegations with an offer of proof containing an explanation of why the alleged omission resulted in the affidavit being misleading. This explanation must be supported by affidavits or sworn statements, or an explanation for the absence of such. See *Id.* Moreover, as noted, even if the defendant makes such a substantial showing, no hearing is necessary if, upon adding the alleged omission and retesting, probable cause still exists. *Stanert*, 762 F.2d at 782.

After a review of the briefs and the affidavits supporting the search warrants this court finds that defendants have failed to make a substantial showing as to any of the six alleged omissions. Specifically, they do not provide evidence, ie, sworn statements, affidavits or an explanation regarding the lack thereof establish-

ing the information allegedly omitted.⁷ As defendants' allegations are conclusory and unsupported, they fail to satisfy this threshold requirement. No *Franks* hearing is necessary.

Defendants advance as their fifth and last claim that the initial search warrant was not supported by probable cause. In particular they claim that no reliable basis of knowledge was established for the information provided by confidential informant #1 and that the information provided by the informants was stale as it did not establish probable cause to believe the documents sought would be on the premises at the time of the search. This issue requires only a review of the affidavit at issue, thus no hearing is required.

The duty of a court reviewing a previous determination of probable cause is simply to ensure that the magistrate had a "substantial basis" for concluding that given all the circumstances set forth in the affidavit there was a fair probability that evidence of crime would be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 236-239, 103 S.Ct. 2317, 2332 (1983). In keeping with the Fourth Amendment's strong preference for warrants, the determination of the Magistrate is to be accorded great deference. *Id.*; *U.S. v. Shono*, 786 F.2d 981, 983 (10th Cir. 1986). Regarding proof of the reliability of information provided by a confidential informant, the Magistrate need only consider whether the totality of the circumstances establishes the veracity and a sufficient basis

⁷The only potentially relevant sworn testimony offered in support of its allegations is the Allen Friedman social security disability hearing transcript appended as Exhibit E to defendants' reply brief. Aside from the questionable reliability of such transcript (132 pages of transcript submitted without a certification document as to its source or context) and defendant's failure to point to any particular portion thereof to support its claim that Allen Friedman was actually on sick leave, this Court concludes that the fact that such is not the statement of a union official authorized to comment on sick leave, the transcript is unpersuasive as to that alleged fact.

of knowledge of the informant. *Id.* Again, the duty of the reviewing court is only to determine that a substantial basis existed for that conclusion.

A review of the instant affidavit compels the conclusion that the Magistrate properly found probable cause existed. First, the reliability of both Informants 1 and 2 had been corroborated many times in months closely preceding the issuance of the warrant. Government's response, Exhibit A paragraphs 9, 16. (hereinafter Exhibit A). Additionally, the lengthy affidavit contained various facts establishing Informant #1's daily presence at the union and his solid familiarity with the routine of business agents for the unions. Exhibit A paragraphs 8, 10, 11, 12-16. The informant was thus reliably able to state that the alleged ghosts did not perform the functions of a business agent and that the absence of their names on various business forms would be evidence of that fact. Moreover, these statements were corroborated by other facts contained in the affidavit. Exhibit A, paragraph 4 (A. Friedman's admission that he performed no work), paragraph 19 (examination of existing records by the affiant showed that other business agents processed several grievances each month but the alleged ghosts did not), and paragraphs 6-7 (same examination showed other business agents regularly generated reimbursable expenses but alleged ghosts did not). Thus, the Magistrate had a substantial basis for concluding that informant #1 was reliable, that ghosting was occurring and that the sought-after business records were evidence thereof.

Second, regarding defendant's claim that the affidavit information was stale, this Court disagrees and concludes the Magistrate did have a substantial basis for finding probable cause that the documents sought would be present at the time of the search.

Where evidence is likely to remain in place for substantial periods of time, there may be a substantial delay between the occurrence of the observation relied upon by the government and the

issuance of a warrant. *U.S. v. Shomo*; 786 F.2d at 984; *U.S. v. Foster*, 711 F.2d 871, 878 (9th Cir. 1982), *cert. denied*, 465 U.S. 1103 (1984). Where an ongoing, continuous criminal activity is being investigated, the passage of time becomes less critical. *Id.* Business records have specifically been found to be the type of item that reasonably may be expected to be maintained for a long period of time. *Andersen v. Maryland*, 427 U.S. 463, 478, N. 9 (1976); *U.S. v. McManus*, 719 F.2d 1395, 1400-01 (6th Cir. 1983).

The instant affidavit showed that all union business records (the sought after business agent call-in sheets and time and attendance reports were clearly business records) were kept at these premises (Exhibit A, paragraphs 5, 35, 41), and that these particular documents were specifically used for reference purposes (Exhibit, paragraph 16). They thus could be expected to be retained and stored on these premises with the other union records. Also, defendant Friedman repeatedly told informant #1 of his (Friedman's) belief in the need to document all activities and keep such "forever". Exhibit A, paragraph 14. The documents sought were actually seen on the premises by Informant #2 in 1979. Exhibit A, paragraph 16. Also, between September of 1981 and October of 1982 it appears the affiant had seen and reviewed union Executive Board minutes covering 3 prior years which contained business agent information similar to that currently sought. Exhibit A, paragraphs 1, 19. The fact that those records were stored and found on the property between 1981 and 1982 supported an inference that the sought after documents would also be found there. Finally, the recent orders (May 1982) of the types of printed forms sought (Exhibit A, paragraphs 38, 39, 42) indicates these same documents continued to be used by the union and thus, by inference, continued to be stored there in the same manner as observed by Informant #2 in 1979.

Therefore, given the ongoing nature of the crime at issue (employing persons who failed to perform work), the likelihood that business records of this type would be stored for long periods of time and the specific facts pointing to such storage, this Court concludes the information was not stale. The Magistrate had a substantial basis for finding that probable cause existed to search the premises for those documents.

For the above-stated reasons this Court finds that no evidentiary hearing is necessary and that the motion to suppress is denied on the merits.

IT IS SO ORDERED.

/s/ George W. White

U.S. DISTRICT JUDGE

ENTERED: 12/3/87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA
Plaintiff

vs.

JACKIE PRESSER, et al
Defendants

CASE NO. CR86-114

HON. GEORGE W.
WHITE

ORDER

This matter is before the Court on remand to consider the application of the National Broadcasting Company, Inc. to unseal the transcript of the July 10, 1986 conflict of interest hearing. The Sixth Circuit Court of Appeals has clearly stated that a qualified right of public access exists as to such transcript. The transcript thus may remain sealed only if specific findings can be made which demonstrate that there exists a substantial probability of prejudice to defendants' right to a fair trial should unsealing occur. *Applications of National Broadcasting Company, Inc. and WKYC-TV 3 (U.S. v. Presser)*, 828 F.2d 340, 345-346 (6th Cir. 1987) ("Application of NBC"), citing *Press-Enterprise Co. v. Superior Court of California (Press II)*, 106 S.Ct. 2735 (1986).

This Court has reviewed the proposed findings of fact submitted by defendants and finds them inadequate to satisfy the above-noted tests. The specificity needed to justify the continued sealing of the transcript in question has not been supplied.

Instead of unsealing the transcript immediately, however, this Court herein orders the defendants to submit new proposed findings of fact. These new findings shall clearly specify at least the following: 1) the page and line numbers wherein occur statements which the defendants desire sealed; 2) the identity of the maker of

each such statement; 3) whether the statement concerns a defendant or defense counsel; 4) the general subject matter of the statement (i.e., whether it concerns credibility, statements, specific acts or mental processes of a defendant or defense witness, etc.); 5) the claimed constitutional or other basis for sealing of the statement; and most importantly, 6) whether the information has been heretofore disclosed to the government.

Defendants shall submit such proposed findings within ten (10) days of the filing of this Order.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 12/11/87

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al

Defendants

CASE NO. CR86-114

JUDGE GEORGE W.

WHITE

MEMORANDUM

AND ORDER

This matter is before the Court pursuant to the motion of Intervenor-Applicants Mike Conway, (Television Broadcaster), Judy Thompson, (Radio Broadcaster) and Ted Schwarz, (Photographer) requesting this Court to permit the electronic news media to telecast, broadcast and photograph the instant trial. In support of their motion applicants argue that Rule 53 of the Federal Rules of Criminal Procedure and Rule 11.01 of the Local Civil Rules of the United States District Court constitute an absolute prohibition of the electronic media in the courtroom and, as such, violate the First Amendment of the United States Constitution.

Applicants request that oral argument be held on this motion. The request for oral argument is denied as no issue of fact need be resolved. The issue will be decided on the briefs.

The First Amendment right of access to trial proceedings possessed by the press is no greater than that possessed by the general public. *Estes v. State of Texas*, 85 S.Ct 1628, 1631 (1978); *Nixon v. Warner Communications, Inc.*, 98 S.Ct 1306, 1318 (1978). That right entitles one to attend trials, listen to the proceedings and report what occurs. *Id*; *U.S. v. Edwards*, 785 F.2d 1293, 1295 (5th Cir. 1986). The press has no constitutional right to televise, record or broadcast trial proceedings. *Estes v. State of Texas*, 85

S.Ct at 1631; *Chandler v. Florida*, 101 S.Ct 802, 807 (1981) citing *Nixon v. Warner Communications, Inc.*, 98 S.Ct at 1318; *U.S. v. Hastings*, 695 F.2d 1278, 1280-84 (11th Cir.); *cert. denied*, 103 S.Ct 2094 (1983); *U.S. v. Kerley*, 753 F.2d 617, 620 (7th Cir. 1985); *U.S. v. Edwards*, 785 F.2d at 1295-96.

As has been noted by other courts considering this issue, Rules 53 and 11.01 do not preclude any member of the electronic media from attending a criminal trial. All members, whether of the print or electronic media are free to attend, listen and report the proceedings to the public. Moreover, the above-noted rules do not discriminate in favor of the print media by barring electronic equipment from the courtroom. Both types of media representatives may record their observations with pen and paper and both types are prevented from bringing specialized equipment (typewriters, cameras, etc.) into the courtroom. As such, the rules are non-discriminatory. *Estes*, 85 S.Ct. at 1631.

It is thus clear that these rules neither result in the closure of trial proceedings nor discriminate against a particular type of media representative. The rules therefore are not unconstitutional.

The rules at issue constitute, at most, a time, place and manner restriction on a particular method of news gathering, i.e., the broadcasting, televising and photographing of trial proceedings. This specific restriction has previously been upheld as valid. *U.S. v. Kerley*, 753 F.2d at 620 (upholding Rule 53 as a reasonable time, place and manner restriction); *U.S. v. Hastings*, 695 F.2d at 1282-83 (Rule 53 upheld as a reasonable time, place and manner restriction).

This Court agrees with existing precedent. A restriction limiting the presence of photographic, television and broadcasting equipment in the courtroom during trial proceedings is a reasonable and neutral one; it serves the significant government interest of promoting fair and accurate fact finding by assuring that liti-

gants and witnesses are not distracted by media shyness or "show-boating"; and, as discussed above, it does not abridge in an unwarranted manner the activities of the press. See *U.S. v. Hastings*, 695 F.2d at 1282-1283. This time, place and manner restriction is therefore reasonable.

Given the above analysis, this Court finds that Rule 53, Federal Rules of Criminal Procedure and Rule 11.01, Local Civil Rules of the United States District Court, Northern District of Ohio are constitutional. As these rules clearly prohibit the use of telecasting, photographing and broadcasting equipment in the courtroom during trial proceedings, the applicants' motion is denied.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 1/14/88

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

CASE NO. CR86-114

**JUDGE GEORGE W.
WHITE**

-v-

JACKIE PRESSER, ET AL.

Defendants

**MOTION FOR ENLARGEMENT OF TIME IN
WHICH TO FILE PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

On December 11, 1987, the court issued an order requiring that Defendants Jackie Presser, et al., file new proposed findings of fact regarding the continued sealing of the *in camera* hearing conducted on July 10, 1986, regarding alleged conflicts of interest.

Per the Court's order, new proposed findings are to be submitted to the Court within ten (10) days of the filing of the order, or by December 21, 1987.

Defendants herewith request that the period of time in which they may have to file such proposed findings be enlarged until February 1, 1988, for the following reasons.

The undersigned counsel will be out of town and on vacation between December 18 and December 30, 1987. The Court

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 1/14/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al

Defendants

CASE NO. CR86-114

HON. GEORGE W.
WHITE

MEMORANDUM
AND ORDER

This matter is before the Court pursuant to the motion of witness Allen Friedman (hereinafter movant) for an order requiring the government to file under seal for the witness' pending civil actions, ¹ a) a copy of the videotape of his (Allen Friedman's) deposition taken in the instant criminal case; b) a transcribed certified copy of the court reporter's notes of his testimony; and c) all documents referred to at the deposition and which were presented to him during that deposition as government exhibits. Movant seeks the filing and sealing of these tapes and documents in order to preserve such for possible use by him as a party-witness in the pending civil cases. In support of his motion, movant relies on Rules 26 and 27, Federal Rules Civil Procedure; Rule 15, Federal Rules Civil Procedure and certain specified case precedent. The government opposes the motion.

This Court has reviewed the briefs and authority cited. The weight of authority requires that the motion be denied. Movant, who is not a party to the instant criminal action, may not properly petition this court to address discovery issues pending in his civil suits. The motion should be made to the court presiding over the

¹ *Allen Friedman v. United States*, C87-1072 (N.D. Ohio); *Allen Friedman v. Presser*, C87-2286 (N.D. Ohio).

civil actions. *See* F.R.Civ. P, Rules 26(b)(1),(c). This will allow the full range of procedural requirements and safeguards established for the protection of parties to such actions to be implemented. *See, id.*

For these reasons the instant motion is denied.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 1/15/88

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, ET AL.

Defendants

CASE NO. CR 86-114

JUDGE GEORGE W.

WHITE

**MOTION TO MODIFY TRAVEL RESTRICTIONS
INSTANTER**

NOW comes Jackie Presser, by and through counsel, and respectfully requests that the travel restrictions of his bond be modified to allow him to travel to Palm Springs, California from January 1988 through January 31, 1988 for the reasons more fully set forth below.

Mr. Presser underwent prophylactic adjuvant radiation therapy at the Cleveland Clinic between August 10, 1987 and October 14, 1987. During recuperation, as a result of the treatments, he became seriously ill during the week of October 19th. He was admitted to Cleveland Clinic on October 29, 1987 and was discharged on November 4, 1987.

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 1/22/88

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, ET AL.

Defendants

CASE NO. CR 86-114

**JUDGE GEORGE W.
WHITE**

**MOTION TO MODIFY TRAVEL RESTRICTIONS
INSTANTER**

NOW comes Jackie Presser, by and through counsel, and respectfully requests this Court that the travel restrictions of his bond be modified to allow him to travel between Palm Springs, California and Phoenix, Arizona from February 1, 1988 through March 11, 1988 for reasons more fully set forth below.

Mr. Presser is currently being treated by physicians in the Phoenix, Arizona area. Pursuant to his doctor's orders, Mr. Presser must rest and recuperate in a warm, dry climate. Mr. Presser is currently recuperating in Palm Springs, California. Consequently, Mr. Presser is required to travel between Palm

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 2/11/88

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

-v-

JACKIE PRESSER, ET AL.

Defendants

CASE NO. CR86-114

**JUDGE GEORGE W.
WHITE**

**MOTION TO SEAL DOCUMENTS TO BE
SUBMITTED TO THE COURT FOR *IN CAMERA*
REVIEW**

Now come defendants Jackie Presser (hereinafter "Presser"), Anthony Hughes (hereinafter "Hughes") and Harold Friedman (hereinafter "Friedman") and respectfully move this Honorable Court for an Order sealing the documents listed below, which have been previously provided defendants by the Government.

1. May 10, 1983 Memorandum to FBI Director William H. Webster from Executive Assistant Director Oliver B. Revell.
2. February 17, 1984 Note to FBI Director William H. Webster from Executive Assistant Director Oliver B. Revell.
3. April 6, 1984 Note to FBI Director William H. Webster from Executive Assistant Director Oliver B. Revell.

**MOTION DENIED.
IT IS SO ORDERED.**

JUDGE /s/George W. White

ENTERED: 2/11/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al

Defendants

CASE NO. CR86-114

HON. GEORGE W.
WHITE

MEMORANDUM
AND ORDER

This matter is before the Court on the motion of defendants Jackie Presser, Anthony Hughes and Harold Friedman requesting that the Court order the government to allow discovery of specified documents. (Hereinafter Motion To Show Cause). Defendants ground their right to discovery on Rule 16, Federal Rules of Criminal Procedure; *Brady v. Maryland*, 83 S.Ct 1194 (1963); *Giglio v. U.S.*, 92 S.Ct 763 (1972) and *U.S. v. Bagley*, 105 S.Ct 3375 (1985). The government responds that the requested documents either do not exist, are not within the control of the prosecution, or have been released to the defendants to the degree required by the above-cited law. The government has submitted numerous documents to this Court for *in camera* review to insure that all discoverable material contained therein has been disclosed.

This Court has reviewed the instant moving papers, the materials submitted for *in camera* review, and the government's various notices of compliance with discovery duties. It appears from such review that, with the exception of documents underlying the pending appeal of this Court's discovery order dated August 21, 1987 (as amended on September 4, 1987), the prosecution has complied with the discovery duties imposed by law and by the pre-

vious orders of this court. As such, the defendants' Motion To Show Cause why the government should not be ordered to comply with this Court's discovery order of March 19, 1987 is denied.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 2/11/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, *ET AL.*

Defendants

CASE NO. CR 86-114

JUDGE GEORGE W.
WHITE

MOTION TO
MODIFY TRAVEL
RESTRICTIONS

NOW comes Jackie Presser, by and through counsel, and respectfully requests this Court that the travel restrictions of his bond be modified to allow him to remain in Phoenix, Arizona from March 12, 1988 through April 4, 1988 for reasons more fully set forth below.

Mr. Presser is currently being treated by physicians in the Phoenix, Arizona area. Pursuant to his doctor's orders, Mr. Presser must rest and recuperate in a warm, dry climate. While in Phoenix, Mr. Presser will be working a few hours a day in his capacity as President of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 3/18/88

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

vs.

CASE NO. 86-114

JUDGE GEORGE W.

WHITE

JACKIE PRESSER, ET AL.

Defendants

**DEFENDANTS' MOTION FOR AN EXTENSION OF
TIME TO REPLY TO GOVERNMENT'S RESPONSE
TO DEFENDANTS' MOTION TO DISMISS THE
INDICTMENT**

Defendants, Jackie Presser, Harold Friedman and Anthony Hughes hereby move this Court for an extension of time in which to reply to the Government's Response to Defendants' Motion to Dismiss the Indictment.

Defendants herewith request that the period of time in which they may reply be enlarged until April 6, 1988, for the following reasons.

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 3/25/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al

Defendants

CASE NO. CR86-114

HON. GEORGE W.

WHITE

ORDER

This matter is before the Court pursuant to the government's Motion for Report on Defendant Presser's Medical Condition, for Production of Medical Records, And for Status Call.

In accordance with such motion, this Court orders the parties to appear personally and with their counsel before it on Wednesday, May 11, 1988 at 9:30 a.m. At that time the Court will entertain the government's said motion for an order compelling the production by defendant's of 1) an updated report on defendant Presser's health; 2) defendant Presser's recently generated medical records; and 3) any other unproduced medical records concerning the health of defendant Presser. The parties will be prepared to submit at that time any evidence relating to said motion.

Additionally, this hearing will constitute a status call on the questions of (1) current state of defendant Presser's health and (2) how this health status impacts on the trial date previously set by this Court. The parties are ordered to be prepared to submit at that time any testimony, records, depositions, etc., impacting on these questions.

Finally, the parties will be prepared to discuss the implementation of voir dire procedures for the upcoming trial.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 5-4-88

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

-v-

JACKIE PRESSER, ET AL.

Defendants

CASE NO. CR86-114

**JUDGE GEORGE W.
WHITE**

**MOTION TO RECONSIDER THE FEBRUARY 11,
1988 ORDER DENYING DEFENDANTS' MOTION
TO SEAL DOCUMENTS TO BE SUBMITTED TO THE
COURT FOR *IN CAMERA* REVIEW**

Now comes defendants Jackie Presser, Harold Friedman and Anthony Hughes and respectfully request that this Court reconsider the Order entered February 11, 1988 denying defendants Motion To Seal Documents To Be Submitted to the Court for *In Camera* Review so that this Court can consider these documents in reviewing defendants' Motion to Reconsider, which is filed simultaneously with this motion.

As this Court is aware, the Government has filed documents under seal in order to aid this Court in its determination relative to defendants' Motion To Show Cause. All defendants request is to be placed on equal footing with the Government, so as to allow the Court to fully assess all pertinent evidence in evaluating defendants other motion for reconsideration.

**MOTION DENIED.
IT IS SO ORDERED.**

JUDGE /s/George W. White

ENTERED: 5/9/88

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

-v-

CASE NO. CR 86-114

JUDGE GEORGE W.

WHITE

JACKIE PRESSER, *et al.*,

Defendants.

**MOTION TO CONTINUE THE HEARING
SCHEDULED FOR MAY 11, 1988**

Now comes the defendant Jackie Presser and respectfully requests that the hearing relative to his present medical condition, scheduled for May 11, 1988 at 9:30 a.m., be continued until June 6, 1988 for the following reasons:

1. Defendant Presser has not requested a continuance of the July 12, 1988 trial date. He hopes to be available to defend himself on that date. As of this date, he has instructed his attorneys not to request a continuance; and
2. Defendant Jackie Presser was admitted to the Cleveland Clinic on May 2, 1988 for an extensive medical examination and evaluation. The medical evaluation is ongoing. He is currently receiving daily radiation therapy. It is expected that Mr. Presser will be in the Cleveland Clinic through the week of May 9th; and

3. Defendant Presser's counsel John R. Climaco will be unavailable on May 11, 1988 due to

MOTION GRANTED.

Continued to June 3, 1988 at 9:30 a.m.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 5/10/88

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al

Defendants

CASE NO. CR86-114

HON. GEORGE W.

WHITE

ORDER

This matter is before the Court pursuant to the motion of defendants Presser, Friedman and Hughes for reconsideration of this Court's previous order denying the suppression of certain evidence. The government opposes reconsideration of said order.

In the motion, defendants proffer neither new legal authority nor new facts which might support reconsideration of the existing order. The legal authorities which defendants do cite in said motion were clearly in existence during the pendency of the original motion to suppress. Defendants had ample opportunity to present these authorities and arguments at that time. Similarly, defendants proffer no facts which were not offered or could not have been offered at the time of original motion. As such, no rational basis exists to justify reconsideration of the original order.

Moreover, this Court has previously fully considered the issues and authorities relevant to the motion to suppress. The existing order properly disposes of those issues. For the foregoing reasons, defendants' motion for reconsideration is denied in its entirety.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 5/13/88

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA
Plaintiff

vs.

JACKIE PRESSER, et al
Defendants

CASE NO. CR86-114

**HON. GEORGE W.
WHITE**

ORDER

This matter is before the Court pursuant to April 23, 1988 motion of defendants Presser and Hughes for the production of documents. This motion repeats requests for the production of two specific documents which requests this Court has previously denied. Additionally, defendants request, apparently for the first time, production of a third document. The government opposes these production requests arguing the motion is repetitive as it reasserts requests for documents which have already been provided to the extent required by law or which have been previously denied by this Court.

This Court will consider the instant motion regarding the first two production requests to be a motion for reconsideration. A motion to reconsider a previously-issued Court order should be supported by a proffer of new factual evidence, new legal authority or some other change in circumstances justifying the reconsideration. See Fed.R.Civ.Pro., Rule 59(a), (2), (e); 27 Fed. Proc., L.Ed. §62:372.

Defendants herein rely on two grounds to support their reconsideration motion regarding requests #1 and #2. First, they reassert their reliance on Rule 16(a) of the Federal Rules of Criminal Procedure, *Brady v. Maryland*, 373 U.S. 83 (1963), *United States*

v. Bagley, 473 U.S. 667 (1985), and on this Court's discovery order of March 18, 1987.

This ground clearly contains no new material for the Court's consideration.¹ As such, it clearly fails to support reconsideration.

As a second ground in support of reconsideration of requests #1 and #2, defendants contend that justice requires this Court to exercise its inherent supervisory powers to compel production. Because defendants cite to a recently published Sixth Circuit opinion in this regard, this ground will be considered to contain new legal authority and therefore be supportive of a motion for reconsideration.²

¹ It is conceivable that defendants believe that their reference to certain documents submitted in an appendix to defendant's separate motion to dismiss constitutes the submission of new evidence supporting reconsideration. This submission does not constitute new evidence as it appears such was available to defendants and could have been submitted to the Court during the pendency of the original motion. In fact, defendants admit they had possession of the evidence at that time. Defendants' motion for Production of Documents (filed 4/13/88) at 1-2, N. 1-3. To allow arguments and evidence on motions to be submitted in a piecemeal fashion, where such can be easily avoided, would unduly burden the already heavy district court dockets.

Again, however, in an abundance of caution, this Court has considered these referenced documents. A review of said documents compels the conclusion that the documents do not indicate that *Brady* material is being withheld from the defendants. Moreover, even if the opposite conclusion were to be reached, this Court does not have the power to order pretrial production of *Brady* material. Defendants' remedy for such a *Brady* violation would be a new trial after appeal. *United States v. Presser et al*, #87-3896, slip op. at 22, (6th Cir. April 25, 1988). Additionally, this Court concludes such production is not appropriate under defendants "justice" contention. See *infra*.

² Defendants' justice argument relies, in reality, on case precedent in existence well before the filing of the original order in question. Also, the new Sixth Circuit opinion cited by defendants (*United States v. Presser, et al*, No. 87-3896, slip op. at 22, and n.12) provides, at best, only tangential support for defendants' argument. However, this Court will grant reconsideration based on this ground, again, in an abundance of caution.

The Court's power to order discovery outside the bounds of existing discovery rules is discretionary. Such power is also closely limited to those situations where the existing criminal discovery rules do not provide for the requested discovery and when justice would be otherwise subverted by the failure to provide discovery. See *United States v. Presser, et al*, #87-3876, slip op. at 22, and n.12.

This Court is unconvinced that the information referred to in requests #1 and #2 requires the exercise of this Court's above-noted inherent power. The government states it has reviewed these documents and has provided defendants with all information contained therein discoverable pursuant to *Brady* and to Rule 16 of the Federal Rules of Civil Procedure. Moreover, this Court has previously reviewed these requests and found no need to order pretrial production thereof. Given these circumstances, this Court declines defendants' invitation to exercise any further power to order production of these two documents.

Regarding Defendants' request for production of document # 3, as previously noted, this appears to be a new request.³ Defendants proffer the same grounds, i.e., *Brady, et al* and justice, in support of said request. The government responds that it has located and reviewed this document for *Brady* material. It has concluded that none is contained therein and thus opposes production.

Neither of these grounds support the motion to compel production. Again, as previously noted, the *Brady* doctrine does not provide a pretrial remedy for an alleged violation of its pretrial disclo-

³ This Court will assume that this motion constitutes a supplemental request for discovery and is thus within this Court's previous discovery deadline. (All defense motions to be filed by April 30, 1988, subject to supplementation as needed. Hearing transcript of March 9, 1987 at 3-4; Hearing transcript of May 5, 1987 at 71-72).

sure duties. See note 1, *supra*. Additionally, this document (a memo written by FBI official Robert Magee, concerning a conversation between himself and two other government officials) does not fall within the disclosure requirements of Rule 16, Fed.R.Crim.P. Finally, for several reasons, this Court declines to exercise its inherent power to compel discovery. First, the government has reviewed the document and stated no exculpatory and material information is contained therein. If the government is in error in this assessment it must face the consequences of appeal and new trial. *United States v. Presser, et al*, at 87-3896, slip op. at 22. Additionally, the document's description itself does not compel the conclusion that justice will be subverted by the absence of pretrial discovery. For these reasons, this Court declines to compel production under its supervisory powers.

Finally, defendants apparently again request reconsideration of this Court's previous order denying discovery of the "10,000 documents" and the "Prosecutive Memoranda". This Court has previously ruled on and denied such motion to reconsider. (Memorandum and order filed May 13, 1988). In conclusion, the April 12, 1988 motion of defendants Presser and Hughes for Production of Documents is denied.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 5/13/88

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**APPLICANTS NATIONAL
BROADCASTING COMPANY,
INC. and WKYC-TV3,**

Intervenors,

**UNITED STATES OF AMERICA,
*Plaintiff,***

V.

JACKIE PRESSER, et al.

Defendants.

CASE NO. CR86-114

**JUDGE GEORGE W.
WHITE**

**MOTION FOR AN
ORAL HEARING**

Applicants, National Broadcasting Company, Inc. and WKYC-TV3 ("NBC"), hereby respectfully move for an oral hearing on all remaining issues relating to NBC's Applications for access, for the reasons and upon the grounds that continuing delay constitutes continuing denial of Applicants' and the public's First Amendment rights, particularly in view of Defendants' repeatedly demonstrated inability to satisfy their burdens of proof as set forth in Applicants' Briefs previously filed herein.

Respectfully Submitted,

/s/Terence J. Clark

**TERENCE J. CLARK
JOSEPH A. CASTRODALE
CALFEE, HALTER
& GRISWOLD**

1800 Society Building
Cleveland, Ohio 44114
(216) 781-2166

MOTION DENIED

**Attorneys for Applicants
National Broadcasting
Company, Inc. and WKYC-TV3
IT IS SO ORDERED.**

JUDGE /s/George W. White

ENTERED: 5/13/88

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

NO. 87-3896

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

**JACKIE PRESSER, HAROLD FRIEDMAN and
ANTHONY HUGHES,**

Defendants-Appellees.

Before: MARTIN, GUY and BOGGS, Circuit Judges.

J U D G M E N T

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby vacated and the case is remanded to the district court for further proceedings.

No costs taxed.

ENTERED BY ORDER
OF THE COURT

John P. Hehman, Clerk

/s/ John P. Hehman

Clerk

Issued as Mandate: May 16, 1988

A True Copy.

COSTS: None Attest:

Filing fee \$

Printing \$

Total \$

/s/ Garry McCarthy

Deputy Clerk

ENTERED: 5/19/88

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 87-3896

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JACKIE PRESSER;
HAROLD FRIEDMAN; and
ANTHONY HUGHES,
Defendants.

ON APPEAL FROM
THE UNITED
STATES DISTRICT
COURT FOR THE
NORTHERN
DISTRICT OF
OHIO.

Decided and Filed April 25, 1988

Before: MARTIN, GUY and BOGGS, Circuit Judges.

BOGGS, Circuit Judge. The United States appeals a pre-trial order of the district court entered in its prosecution of Jackie Presser, Harold Friedman and Anthony Hughes. The district court ordered the government to disclose "any and all impeachment evidence in the possession of the prosecution which tends to negate guilt" The government argues that the district court lacked authority to issue the discovery order because it compels the disclosure of material exempted from pre-trial discovery by the Jencks Act, 18 U.S.C. § 3500, as well as material whose disclosure is not required under either Rule 16 of the Federal Rules of Criminal Procedure or *Brady v. Maryland*, 373 U.S. 83 (1963),

and its progeny. We agree with the government's contentions and, accordingly, vacate the order of the district court.

I

On May 16, 1986, a federal grand jury handed up an indictment charging that Presser, Friedman and Hughes abused their positions as local union officers by conspiring to employ and by employing "ghost" employees at Local 507 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local 19 of the Bakery, Confectionary and Tobacco Workers International Union, AFL-CIO. The indictment charges that Presser, as the Secretary-Treasurer of Local 507, Friedman as President of Local 507 and of Local 19, and Hughes as the Recording Secretary for Local 507, caused union funds to be paid to supposed union employees Jack Nardi, Allen Friedman, George Argie, and Hughes, as a business agent for Local 19, for services which the defendants knew none of the recipients of the funds had rendered.

The indictment charges that the defendants' actions violated provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962 (c) & (d), and of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 439(b) & 501(c). The indictment also charges that Presser violated the Employee Retirement Income Security Act (ERISA), 18 U.S.C. § 1027, by making false statements and concealing facts about the "ghost" employees on documents required to be maintained under ERISA.

The defendants have notified the government and the district court that they intend to defend against the charges, at least in part, on the ground that their actions were authorized by the government. The defendants claim that during the period of time charged in the indictment, Presser and Hughes were "cooperating citizens" for the Federal Bureau of investigation (FBI) and

that the FBI authorized their activities. The government has provided the defendants with sworn statements from the three FBI agents who supposedly acted as contact agents for the defendants.¹ Although the statements may tend to support the defendants' claim that they were directed to employ the "ghost" employees by the FBI, the government maintains that the defendants' conduct was not in fact authorized and, consequently, that their defense is false.

On September 10, 1986, Presser and Hughes filed a motion for discovery of "all information to which they are entitled under Rule 16(a) of the Federal Rules of Criminal Procedure and ... pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Bagley*, 87 L.Ed. 41 (1985) ... which may be favorable to the defendants or material to their guilt or punishment or which could lead to such favorable information or information material to their guilt or punishment."² Accompanying this broad discovery request were 211 specific requests for material related to the defendants' authorization defense.

On October 10, 1986, the government responded to the discovery motion. It agreed to provide before trial discovery of materials required to be disclosed by Rule 16 of the Federal Rules of Criminal Procedure and *Brady v. Maryland* but opposed the discovery of impeaching material about government witnesses because such material is exempt from pre-trial disclosure by the Jencks Act.

¹ The three FBI agents were Robert Friedrich, Martin McCann and Patrick Foran. According to the government, Friedrich and McCann are no longer FBI agents.

² Fed. R. Crim. P. 16(a) lists specific kinds of evidence that must be disclosed to the defense before trial such as statements of the defendant, the defendant's prior criminal record, and reports of physical or mental examinations and tests that the government intends to use in its case-in-chief at trial or that are material to the preparation of the defense. The rule specifically states that it does not authorize the pre-trial disclosure of material exempted from pre-trial discovery by the Jencks Act. Fed. R. Crim. P. 16(a)(2).

The government also submitted materials to the district court *in camera* to determine their discoverability under the *Brady* doctrine.

In December 1986, Presser and Hughes filed a three-volume supplemental memorandum in support of their September 1986 discovery request for exculpatory material and impeachment evidence.

The government responded to this memorandum in January 1987, claiming that it already had provided the defendants with all exculpatory information it was required to disclose before trial concerning the authorization defense. The government stated that all impeachment evidence in its possession concerning a government witness's credibility, would be disclosed during trial in accordance with the Jencks Act.

In March 1987, the district court ordered the government to provide the defendants with immediate discovery of "all documents, memoranda, notes or interview reports ... tangible objects and other information, including, but not limited to, videotapes, other recordings or any summaries or transcripts whether or not they are work product which contains exculpatory material" and "all documents, memoranda, statements, affidavits, and depositions, if any, which have been provided by the government to members of the news media"

On April 30, 1987, the defendants filed another Supplemental Memorandum for Disclosure of Impeachment Material, contending that "impeachment material need not be exculpatory in order to invoke the Brady duty to disclose." Accordingly, the defendants requested "complete copies of any and all impeachment material relating to prospective witnesses in this case and, in particular, to government agents McCann, Foran and Friedrich."

The government responded to the April 1987 Supplemental Memorandum in May, reasserting its contention that impeachment materials for government witnesses need not be produced until trial under the Jencks Act. The government further responded that the *Brady* doctrine never requires the government to provide discovery of evidence unfavorable to the defendants, such as government evidence which could impeach defense witnesses.

On August 21, 1987, the district court granted the defendants' motion for disclosure of impeachment material stating:¹

Defendants specifically request that impeachment material, separate and apart from exculpatory material which this Court has previously ordered to be disclosed, is discoverable and request the production of such material. The governments' response to the above-mentioned motion first directs the Courts attention to a point which the parties do agree. The United States concedes that it must disclose to the defendants impeaching materials within its possession relating to witnesses called by the government to testify against the defendants. However, the government raises two issues upon which the parties disagree. The issues are as follows: 1) must impeaching material be produced before trial or may they be produced at trial in time for the defendants to make use of them, and 2) must the government provide to the defendants impeaching materials *unfavorable* to the defense which the government may use to cross examine witnesses called to testify on behalf of the defendants.

The Supreme Court has defined impeachment material as 'evidence favorable to an accused . . . so that, if disclosed and use effectively, it may make the difference between conviction and acquittal.' *United States v. Bagley*, 473 U.S. ___, 105 S.Ct. 3375, 3380 (1985). Impeachment evidence need not be exculpatory in the traditional sense of tending to negate guilt. Rather, such material deals with the credibility of witnesses.

¹ The district court's order is reproduced as it appears in the record.

In *Giglio v. United States*, 405 U.S. 150, 154 (1972), the Supreme Court held that:

When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule.

The general rule articulated in *Giglio*, is the Brady rule. See: *Brady v. Maryland*, 373 U.S. 206 (1963).

In, addressing the issue of the timing of disclosure, this Court finds that any and all impeachment material in the possession of the prosecution is to be turned over to the defense forthwith. Specifically, regarding the impeachment testimony relating to government agents McLann, Foran, Friedrich and any other present or former agents this Court believes that these witnesses credibility will be material to the establishment of defendants authorization defense. Accordingly, defenses' motion for disclosure of impeachment material is Hereby Granted.

On September 4, 1987, the government filed a motion asking the court to reconsider its August 21, 1987, discovery order. In the motion the government stated that in the interests of narrowing the issues, it would comply with the discovery order by providing immediate discovery of any impeachment materials in its possession not protected by the Jencks Act relating to government witnesses Allen Friedman, Jack Nardi and George Argie.⁴ The government refused, however, to disclose Jencks Act materials related to those witnesses' testimony and also refused to disclose materials unfavorable to the defense which the government might use at trial to impeach defense witnesses or to rebut defenses.

⁴ The government characterized these impeachment materials as "materials which relate to misconduct of these witnesses not resulting in convictions." The government also notified the court that its voluntary disclosure of this impeachment evidence was not a concession "that these materials are discoverable at this time."

The district court held a hearing on the government's motion for reconsideration on September 4, 1987. After the hearing, the court amended its August discovery order, attempting to clarify that the order required the immediate disclosure only of impeachment evidence in the possession of the government "which tends to negate guilt."

At the September 4, 1987, hearing, the government argued that it was not required to disclose Jencks Act impeachment material before trial and that it was not required to disclose impeachment material concerning defense witnesses at any time because such evidence is, in its view, unfavorable to the defense. Accordingly, the government informed the court that it did not intend to comply with the discovery order, even as amended, and requested the court to "impose the appropriate sanctions" so that the government could appeal the issue. The court orally responded:

I will deny that request. You may try your case the way you wish to try it. You may find when you get to trial you may not get a witness on if you haven't complied with my order, and you can go about what you want to do, but that's my statement in regard to that, counsel.

II

Before resolving the substantive issue raised in this appeal, the court must first address the contention that it does not have jurisdiction over the appeal. Defendants-appellees have filed a motion to dismiss the appeal on the ground that the lower court has not entered an order suppressing or excluding evidence. The government responds that the court's oral statement that the government's failure to comply with the discovery order will jeopardize its use of witnesses whose statements or other impeachment materials are withheld constitutes a conditional suppression order and,

consequently, is sufficient to invoke this court's jurisdiction under 18 U.S.C. § 3731.⁵

18 U.S.C. § 3731 provides, *inter alia*,

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence ... not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

In *United States v. Battisti*, 486 F.2d 961 (6th Cir. 1973), this court discussed at length the appealability of a pre-trial discovery order under 18 U.S.C. § 3731. In that case, the district court ordered the government to disclose to the defense before trial the names and addresses of all Government witnesses and the known records of prior criminal convictions of prospective witnesses. The court's order provided:

The failure of the Government to comply with this order will result in the exclusion of the testimony of the witness or witnesses to which the information pertains.

Battisti, 486 F.2d at 965.

While considering whether the district court's order in *Battisti* sufficiently indicated that evidence would be excluded if the government did not comply with the discovery order, we noted that the statute mandates that "[t]he provisions of this section shall be liberally construed to effectuate its purposes," which we con-

⁵ In the alternative, the government requests the court to exercise its power to issue a writ of mandamus ordering the district court either to vacate the discovery order or to enter a suppression order so that the government may pursue an appeal. Because we hold that jurisdiction over the appeal exists under 18 U.S.C. § 3731, we do not reach the merits of the government's petition for a writ of mandamus.

cluded were to provide appellate review of district court decisions against the United States on specific matters before jeopardy attaches to a criminal prosecution. *See id.*, at 967. We also stated that

[p]erhaps the most convincing argument in favor of the appealability of the order in the present case is contained in the legislative history [of 18 U.S.C. § 3731]. It was the aim of Congress to give the Government a right to appeal discovery orders which go beyond the rules of criminal procedure. S. Rep. 91-1296 (91st Cong., 2d Sess.), p. 5,

Ibid. Accordingly, we concluded,

[t]he Supreme Court has observed that it is not the label but the substance of the ruling which determines the question of appealability The substance of the instant order is that the evidence will be excluded if the Government does not comply with the order. We conclude that this is an order 'excluding evidence' within the spirit, if not the literal wording, of 18 U.S.C. § 3731.

Ibid. (citation omitted).

Although we acknowledge that there is somewhat more ambiguity about the district court's future actions in this case than there was in *Battisti*, we view the district court's oral statement as evidencing an intent to exclude government evidence if the government does not comply with its discovery order and consequently, its statement qualifies as an appealable order "within the spirit, if not the literal wording, of 18 U.S.C. § 3731." Accord-

ingly, this court has jurisdiction over this appeal under 18 U.S.C. § 3731.⁶

III

The substantive issue to be resolved is whether the district court possessed the authority to order the government to disclose before trial "any and all impeachment evidence ... which tends to negate guilt?" The district court concluded that the government is required to disclose the impeachment evidence by virtue of the rule of *Brady v. Maryland*, that the government is under a general duty to disclose evidence favorable to the accused. In support of its order, the court cited the Supreme Court decisions in *Giglio v. United States*, 405 U.S. 150 (1972), and *United States v. Bagley*, 473 U.S. 667 (1985). In the district court's view, these decisions hold that impeachment evidence of key government witnesses is *Brady* material and therefore, subject to disclosure to the defense before trial.

⁶ We are troubled by the district court's refusal to enter a written order sanctioning the government for its noncompliance with the discovery order after the government specifically requested such an order from the district court. A district court cannot abort the government's right to an appeal simply by declining to rule on a matter when asked to do so. Congress expressly provided the government with the right to appeal its contention that the district court does not have the authority to make this discovery order at this stage of the proceeding, that is, before jeopardy attaches. Indeed, once jeopardy does attach, the government is unable to appeal the issue unless it obtains a conviction and the defendant decides to seek an appeal.

We also note that we do not view our decision that the district court's oral statement in this case is an appealable order under 18 U.S.C. § 3731 as conflicting with our holding in *United States v. Zipkin*, 729 F.2d 384, 389 (6th Cir. 1984), that a written order of a judge should speak for itself and should not be varied by parol evidence as to what was meant by its provisions. In this case, the district court's discovery order was written but the sanction order was oral. The sanction order is the order which provides jurisdiction over the appeal and we have interpreted that order as it appears in the context of the record.

Close examination of these decisions, particularly in the context of the Court's other decisions construing the dimensions of the *Brady* doctrine, leads us to conclude that the district court overstated the meaning of *Brady* and *Giglio*.

The Supreme Court repeatedly has emphasized that

[t]he *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.

Bagley, 473 U.S. at 675 (footnotes omitted).

Since establishing the *Brady* rule, the Court has adhered to its subsequent statement that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one" *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). In fact, the Court has explained that the basis for the *Brady* rule, "the Due Process Clause[,] has little to say regarding the amount of discovery which the parties must be afforded." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). It speaks "to the balance of forces between the accused and his accuser." *Ibid*.

Thus, the *Brady* doctrine, in its purest form, is the rule of law that the Due Process Clause is violated when the government achieves a conviction through the use of perjured testimony, *e.g.*, *Napue v. Illinois*, 360 U.S. 264 (1959), or by withholding a confession of guilt by someone other than the accused, *e.g.*, *Brady v. Maryland*, or by withholding evidence "so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to

produce,"⁷ *United States v. Agurs*, 427 U.S. 97, 107 (1976). The doctrine evolved out of the tenet of constitutional law that it is fundamentally unfair for the government to obtain a conviction in such circumstances, regardless of whether the government suppressed the evidence knowingly or unknowingly. However,

unless the omission deprived the defendant of a fair trial, there [is] no constitutional violation requiring that the verdict be set aside to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.

Agurs, 427 U.S. at 108.

Accordingly, the obligation the *Brady* rule imposes on the government is

the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment [A] majority of this Court has agreed, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

Pennsylvania v. Ritchie, 107 S.Ct. 989, 1001 (1987) (citations omitted) (emphasis added).

⁷ An example of such evidence is "fingerprint evidence demonstrating that the defendant could not have fired the fatal shot." *Agurs*, 427 U.S. at 110 n.18.

In *Agurs*, the prosecutor failed to disclose to the defense the fact that the victim had a prior criminal record of guilty pleas to charges of assault and of carrying a deadly weapon. While this material was exculpatory in that it related to the defendant's claim of self-defense, the Court ultimately held that the failure to disclose the evidence did not constitute a *Brady* violation because there was no reasonable doubt about the defendant's guilt "whether or not the [omitted] evidence [was] considered, [and, thus,] no justification for a new trial." *Agurs*, 427 U.S. at 113.

The Court also has made it clear that while the *Brady* rule imposes a general obligation upon the government to disclose evidence that is favorable to the accused and material to guilt or punishment, the government typically is the sole judge of what evidence in its possession is subject to disclosure. If it fails to comply adequately with a discovery order requiring it to disclose *Brady* material, it acts at its own peril. See *Pennsylvania v. Ritchie*, 107 S.Ct. at 1003; accord *Bagley*, 473 U.S. at 682-83. But significantly, if the government does fail to disclose *Brady* material, the defendant has a constitutional remedy for the nondisclosure *only* if the defendant can show that there is a reasonable probability that "the omission deprived the defendant of a fair trial." *Agurs*, 427 U.S. at 108.

In a footnote to *Agurs*, the Court dismissed an argument that the definition of material evidence under the *Brady* rule should "focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence." *Agurs*, 427 U.S. at 112 n.20. The Court stated:

[s]uch a standard would be unacceptable for determining the materiality of what has been generally recognized as '*Brady* material' for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge.

Ibid.

The Court's decisions in *Giglio* and *Bagley* are not a departure from its reasoning in *Agurs* or from the Court's other *Brady* decisions. In both cases the Court held that the failure of the prosecu-

tion to disclose to the defense that the prosecution's key witnesses had personal interests at stake when they testified during the trials was material evidence which should have been disclosed pursuant to the *Brady* doctrine, because had the material been "disclosed and used effectively, it [might have made] the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676.

In *Giglio*, the prosecution had promised a coconspirator of the defendant that he would not be prosecuted if he testified against the defendant. The Court found it significant that the government's case against the defendant rested "almost entirely" upon the coconspirator's testimony. Consequently, the Court concluded that if the information had been disclosed to the defense, there was a reasonable probability that the defendant could have changed the outcome of the trial by attacking the credibility of the coconspirator's testimony. Accordingly, the Court vacated the defendant's conviction and remanded the case for a new trial. *Giglio*, 405 U.S. at 154-55.

Similarly, in the more recent case of *Bagley*, the prosecution failed to disclose to the defense that the government's two key witnesses, two private security guards, had a contract to supply information to the Bureau of Alcohol, Tobacco and Firearms, and that payment under the contract was conditioned upon whether the information supplied by the guards led to a successful prosecution of the defendant. The Court reasoned that because the defense specifically requested discovery of evidence of any inducements that had been made to the guards to testify against the defendant, the prosecutor's failure to disclose that such inducements existed made it likely that defense counsel believed the witnesses could not be impeached on the grounds of bias or interest. Consequently, the Court reasoned that the nondisclosure caused defense counsel not to pursue that line of cross-examination. See *Bagley*, 473 U.S. at 683. However, because it also was possible that the defendant would have been convicted even if the informa-

tion had been disclosed, the Court remanded the case for a determination of whether the nondisclosure involved "material" evidence under the *Brady* standard. *Bagley*, 473 U.S. at 684.

The Court's decisions in both *Giglio* and *Bagley* are consistent with the tenet on which the *Brady* doctrine is based, that it is fundamentally unfair for the government to achieve a conviction through the concealment of evidence which undermines the strength of the government's case against the defendant.

Neither case, however, gives the defense a general right to pre-trial discovery of evidence impeaching defense witnesses, where the prosecution denies that any such material is exculpatory and material under *Brady*.

If impeachment evidence is within the gambit of the Jencks Act, then the express provisions of the Jencks Act control discovery of that kind of evidence. The clear and consistent rule of this circuit is that the intent of Congress expressed in the Act must be adhered to and, thus, the government may not be compelled to disclose Jencks Act material before trial. See *United States v. Algie*, 667 F.2d 569, 571 (6th Cir. 1982); *United States v. Carter*, 621 F.2d 238, 240 (6th Cir. 1980). Accordingly, neither *Giglio* nor *Bagley* alter the statutory mandate that any "statement" in the government's possession related to the subject matter of a government witness's testimony shall not "be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." 18 U.S.C. § 3500(a).

* The Jencks Act defines "statement" as a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. §3500(e).

In the past, we have noted that the Act was designed to prevent defendants from engaging in "blind fishing expeditions" through the government's files, *see, e.g., United States v. Pope*, 574 F.2d 320, 324 (6th Cir. 1978), but at the same time, to assure defendants of their Sixth Amendment right to confront their accusers by compelling the government to produce statements useful for impeachment of government witnesses. *United States v. Carter*, 613 F.2d 256 (10th Cir. 1979). The Act accommodates both of these concerns by protecting the government's interests before trial and by protecting the defendant's rights at trial, since under the Act the impeachment material is disclosed in time to be used by the defense at trial.

We have found only one federal appellate court which has discussed whether material arguably exempted from pre-trial disclosure by the Jencks Act yet also arguably exculpatory material under the *Brady* doctrine must be disclosed before trial. The Third Circuit stated in *United States v. Higgs*, 713 F.2d 39 (3rd Cir. 1983), and also in *United States v. Starusko*, 729 F.2d 256 (3rd Cir. 1984), that it believes the *Brady* doctrine is not violated if *Brady* material is disclosed in time for its "effective" use at trial. *See Starusko*, 729 F.2d at 262; *Higgs*, 713 F.2d at 44.

We agree with this reasoning. Preserving the defendant's ability to defend himself effectively at trial is the underlying purpose of the criminal discovery rules. Therefore, so long as the defendant is given impeachment material, even exculpatory impeachment material, in time for use at trial, we fail to see how the Con-

stitution is violated.⁹ Any prejudice the defendant may suffer as a result of disclosure of the impeachment evidence during trial can be eliminated by the trial court ordering a recess in the proceedings in order to allow the defendant time to examine the material and decide how to use it.

Accordingly, the district court overstepped its authority when it ordered the government to disclose impeachment evidence before trial, even though the court later clarified that it was ordering the disclosure only of impeachment evidence "which tends to negate guilt." We have examined the record with great care, particularly the transcript of the September hearing on the government's motion for reconsideration, in order to discern exactly what the district court meant when it said that only evidence "which tends to negate guilt" is to be disclosed. Unfortunately, we have not been able to discover precisely how broad or how narrow the scope of the district court's order is. At times during the September hearing, the court indicated that the scope of its order is indeed, as broad as the government contends that it is, in that the court appears to have construed the *Brady* doctrine as requiring the disclosure of any evidence which relates to a potential defense, even if

⁹ In *Starusko*, however, the Third Circuit did indicate that in its view, there may be special circumstances when the *Brady* doctrine may require the disclosure of Jencks Act material before trial. In the Third Circuit's view, the situation could arise when the Jencks Act material truly is exculpatory of the charge against the defendant. See *Starusko*, 729 F.2d at 262-65. The court implied however, that the *Brady* doctrine may require pre-trial disclosure in such a situation because of the due process foundation of the doctrine, that is, that it is fundamentally unfair of the prosecution to withhold from the defendant until trial material which seemingly does prove innocence and therefore, which could obviate the need for a trial altogether. The Third Circuit noted that a prosecutor who withholds such material most likely violates professional ethical canons. However, the court did not state that it was establishing the rule that if exculpatory material is disclosed in time for use at trial, but that the material could have been disclosed earlier, a violation of constitutional law has occurred. Given the court's explicit holding that disclosure in time for effective use at trial is all that the *Brady* doctrine requires, we do not read the *Starusko* decision as undermining the conclusion we have reached in this case.

that evidence is harmful to the defense.¹⁰ At other times during the proceeding, the court indicated that the scope of its discovery order actually is quite confined and merely reiterates what the government concedes is its general duty to disclose material which supports the defendants' claims of innocence.¹¹

However, regardless of which construction we give the district court's order, we cannot uphold it. The broad construction of the order, that any impeachment evidence which is at all related to the defense's case is to be disclosed before trial, clearly is not supported by any decision of this court or of any other court. The narrow construction of the order may seem harmless. Under that construction, the government need disclose only traditional *Brady* material. Even so, the order cannot stand because of the court's accompanying threat to impose sanctions at trial against the government if it does not disclose the *Brady* material before

¹⁰ For example, at one point during the proceedings the court stated,

"I take the position whether it is Jencks or not, if it has any tendency to negate guilt, it should be turned over now."

At another point during the hearing the following exchange took place:

THE COURT: So your position is those inconsistent statements [of Agent Friedrick] should not be turned over?

MR. JIGGER: [For the Government]: That's right your Honor, because they are not helpful to the defense, and they do not come within the gambit of Brady and Bagley.

THE COURT: That's what Bagley is saying, it is saying it is a very close question sometimes, and my position is, if it is a close question, the Government is taking a big chance of not turning it over.

¹¹ At another time during the proceeding the following exchange took place:

MR. JIGGER: Furthermore, your Honor, with respect to material that is — that would be utilized to impeach the defense, the Government suggests that if it is unfavorable to the defense it clearly does not come within the gambit of Brady, Bagley or any of those cases.

THE COURT: And I would say to you if it tends to negate guilt, it does.

MR. JIGGER: But it can't, your Honor.

THE COURT: I don't know. If it can't, then you are not violating my order so far as I am concerned.

trial. Here, the government has represented that it will comply with all of its *Brady* obligations in time for effective use of the *Brady* material at trial. The *Brady* doctrine did not create a constitutional right of pre-trial discovery in a criminal proceeding. *Weatherford v. Bursey*, 429 U.S. at 559. Thus, the district court cannot threaten the government with being unable to put on evidence at trial when the law does not require the pre-trial disclosure the court has tried to compel.

Our decision is supported not only by the previously discussed decisions of the Supreme Court construing the *Brady* doctrine, but also by the absence of any basis for the district court's order in Rule 16 of the Federal Rules of Criminal Procedure. Rule 16 requires the government to disclose to the defense before trial only specific categories of evidence. These categories include prior statements of the defendant, the defendant's prior criminal record, documents, photographs, or tangible objects, which are within the custody or control of the government and which are material to the defense or intended for use by the government in its case-in-chief at trial or which were obtained from or belong to the defendant, and the results of any mental or physical examinations performed on the defendant which are material to the defense or which are intended for use by the government as evidence in its case-in-chief at trial. Rule 16 expressly exempts impeachment material subject to the Jencks Act from disclosure under its provisions. Fed. R. Crim. P. 16(a)(2). More importantly, the discovery afforded by Rule 16 is limited to the evidence referred to in its express provisions. The rule provides no authority for compelling the pre-trial disclosure of *Brady* material, *see United States v. Moore*, 439 F.2d 1107 (6th Cir. 1971), or of any other evidence not specifically mentioned by the rule. *See United States v. Roberts*, 811 F.2d 257, 258-59 (4th Cir. 1987) (*en banc*) (Rule 16 does not require discovery of coconspirator's statement); *accord United States v. Orr*, 825 F.2d 1537, 1541 (11th Cir. 1987); *United States v. Hoffman*, 794 F.2d 1429, 1432 (9th Cir. 1986) (Rule 16

does not require disclosure of the defendant's voluntary statements or of statements made to persons the defendant does not know are government agents); *United States v. Viserto*, 596 F.2d 531, 538 (2d Cir. 1979) (Rule 16 does not require disclosure of the defendant's statements inadvertently overheard and memorialized in notes taken by a witness).

We also find support for our decision in the fact that providing the defense with such a broad right of pre-trial discovery would vitiate an important function of the Jencks Act, the protection of potential government witnesses from threats of harm or other intimidation before the witnesses testify at trial. *See, e.g., Roberts*, 811 F.2d at 259. Clearly, the need to protect witnesses exists whether the witnesses are part of the government's case-in-chief or part of its potential evidence to rebut a possible defense. Accordingly, we conclude that the government cannot be compelled to disclose impeachment material which would be covered by the Jencks Act relating to any potential government witness, whether it be a witness in the case-in-chief or a rebuttal witness. Further, the government need not disclose impeaching material in its possession relating to any potential defense witness where that impeaching material does not meet the *Brady* test of being material and exculpatory.

The following hypothetical illustrates why we conclude that this rule is necessary. A defendant may be prepared to produce two witnesses who would swear falsely that they were with the defendant at the time he is charged with committing a crime. The government has knowledge of three people who can swear that they were with one of the defendant's alibi witnesses. The government's knowledge of these people, and any statements it may possess from them, are "impeachment evidence" and thus could, in the view of the court below, tend "to negate guilt" because the government's evidence affects the defense's alibi. However, if the government were required to disclose material concerning these

potential, impeachment witnesses before trial, the defense possibly could intimidate the three witnesses. The defense also would secure the tactical advantage of knowing which of its potential witnesses is least subject to impeachment.

The error in the district court's reasoning in this case is that it viewed all impeachment evidence that in any way relates to the defendants' authorization defense as "exculpatory" because it relates to their claim of innocence and, therefore, as *Brady* material that must be disclosed before trial. Its discovery order compels the pre-trial disclosure of material that falls within the scope of either the *Brady* doctrine or of the Jencks Act, both of which only require disclosure in time for effective use at trial, as well as the disclosure of impeachment evidence which lies outside the scope of these criminal discovery mechanisms and of Rule 16.¹²

The court already has entered a general discovery order formally requiring the government to comply with the *Brady* rule. The government remains under its constitutional duty to provide the defense with exculpatory material in its possession and will have to face the consequences if it fails to comply with this duty. The decisions which have construed the *Brady* doctrine make it absolutely clear that the remedy for a *Brady* violation is a new trial and that the remedy is available to a defendant only after a first trial has ended in a conviction and only after a defendant shows that there is a reasonable probability that had the *Brady* evidence been disclosed in time for use at trial, the first trial would not have resulted in a conviction. We find no support in any decision construing the *Brady* doctrine for the proposition that a trial

¹² Although a trial court may have some inherent power to enter specific orders compelling the disclosure of specific evidence when justice requires it, the court may not disregard the Jencks Act mandate. See *Napue*, 834 F.2d at 1318. However, in most criminal prosecutions, the *Brady* rule, Rule 16 and the Jencks Act, exhaust the universe of discovery to which the defendant is entitled. See *Napue*, 834 F.2d at 1316-17; *United States v. Bouye*, 688 F.2d 471, 473 (7th Cir. 1982).

judge can threaten to refuse to let a government witness testify in order to sanction noncompliance with the *Brady* doctrine which comes to light before or during trial.

The district court's discovery order to disclose "any and all impeachment evidence" is based on too broad a view of what constitutes "evidence favorable to the accused and material to guilt or punishment." In essence, the district court concluded, on the bases of *Bagley* and of *Giglio*, that the defense has a constitutional right to know the tactical strengths and weaknesses of the government's case against it. The Supreme Court has never held that the Constitution creates such a right and we do not believe that it exists. Accordingly, the district court's discovery order is VACATED and the case is REMANDED for further proceedings.

ENTERED: 5/19/88

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

v.

JACKIE PRESSER, ET AL.,
Defendants.

**CASE NO. CR 86-114
JUDGE GEORGE W.
WHITE**

**MOTION TO CONTINUE HEARING SCHEDULED
FOR JUNE 3, 1988 UNTIL JUNE 6, 1988**

The United States of America, through its undersigned attorneys, requests the Court to continue the hearing concerning, defendant Presser's medical status now scheduled for Friday, June 3, 1988 at 9:30 a.m. until Monday, June 6, 1988. In support of this motion, the government represents that on June 3, 1988 one of its counsel, Stephen H. Jigger, will be in California on a long-scheduled family vacation. Although the government has no desire to seek further postponement of a determination concerning defendant Presser's health status, it respectfully requests the

MOTION GRANTED.

Hearing Set for 9:30 a.m. June 6, 1988

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 5/25/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, *et al*

Defendants

CASE NO. CR86-114

HON. GEORGE W.

WHITE

MEMORANDUM

AND

ORDER

This matter is before the Court pursuant to the motion of defendants Presser and Hughes to continue, pending appeal, the sealing of those portions of the July 10, 1986 attorney conflicts transcript (hereinafter, "Conflicts Transcript") which this Court may order unsealed.¹ The National Broadcasting Company, Inc. and WKYC-TV3 (hereinafter "applicants") oppose the continued sealing pending appeal.

In order to obtain the stay pending appeal of a court order defendants must show: 1) that there is a strong probability of prevailing on the merits of the appeal; 2) that the stay will cause no substantial harm to other parties to the litigation; 3) that there will be no harm to the public interest; and 4) that, if the stay is not granted, there will be irreparable injury to the party seeking the stay. *Holden v. Heckler*, 584 F.Supp. 463, 497 (ND. Ohio 1984); *Holden v. Heckler*, 615 F.Supp. 682, 684 (ND. Ohio 1985); and see *Hamilton Testing Laboratories v. United States Atomic Energy Commission*, 337 F.2d 221, 222 (6th Cir. 1964).

¹ /The lengthy procedural history of the motions surrounding the sealing of the conflicts transcript is discussed both *infra*, and in this Court's Memorandum and Order unsealing portions of the conflicts transcript (filed this day).

This Court has reviewed the grounds advanced by the defendants in support of the requested stay of the unsealing order and concludes that these grounds fail to justify said stay. First, as to those portions of the transcript to be unsealed, defendants make no attempt at all to demonstrate a probability of success on appeal. Moreover, in this regard, this Court notes that the instant sealing order has been addressed by this Court no less than five times and by the Sixth Circuit Court of Appeals one time.² On none of those occasions have the defendants submitted grounds sufficient to satisfy the sealing requirements as set forth by the Sixth Circuit Court of Appeals. *In re Application of National*

² The occasions on which this issue has been addressed by this Court are follows:

a) June 13, 1986, the government publicly filed a motion to Inquire Into Conflicts of Defense Counsel. On June 16, 1986, defendants moved to seal that motion. On June 26, 1986, an oral hearing was held at which the attorneys argued the legal issues raised by the motions. At the conclusion of the hearing this Court granted the sealing motion;

b) between June 16 and July 10, 1986, applicants filed three motions seeking access to (1) the conflicts motion and relevant responding documents, (2) the upcoming conflicts hearings, and (3) certain other pretrial documents. An oral hearing was held on July 10, 1986 concerning the closure of the upcoming conflicts hearing. Defendants had the opportunity at this closure hearing to advance all arguments supporting closure. This Court ultimately granted the motion for closure of the upcoming conflicts hearing;

c) applicants appealed the issue to the Sixth Circuit Court of Appeals. One year later, on July 31, 1987, the Sixth Circuit reversed this Court's closure order and remanded for further consideration in light of its ruling that the public had a qualified First Amendment Right of Access to said transcript. Defendants had at that time the opportunity to argue in support of the sealing order;

Broadcasting Company, Inc. and WKYC-TV3 (United States v. Presser), 828 F.2d 340, 347 (6th Cir. 1987) (hereinafter "*In re Application of NBC*"). Finally, defendants advance, herein, no reason to believe that they would be any more successful should still another opportunity to meet this burden be afforded them. Thus, there is no showing that success upon appeal is likely. The first prong of the standard for the granting of a stay therefore has not been satisfied.

Given the failure of defendants to make the above showing, it is unnecessary to address in detail the remaining three prongs of the stay test. However, in the interests of complete analysis, this Court will comment briefly thereon.

Regarding the second and third prongs, neither has been satisfied here as both the public and the media, an intervening party herein, would be substantially harmed by such a stay. The public is entitled to undelayed access to these types of documents. See *Associated Press v. United States District Court*, 705 F.2d 1143 (9th Cir. 1983). An indefinite sealing pending appeal, in addition to the current twenty-one month sealing, all without the requisite

d) On September 29, 1987, this Court conducted a hearing upon remand to provide defendants with an opportunity to meet their burden, as specified by the Sixth Circuit, justifying the continued sealing of the conflicts transcript. They failed to do so and were afforded 10 days in which to submit proposed findings of fact and conclusions of law satisfying that burden;

e) upon review of the proposed findings subsequently submitted this Court found that defendants had still failed to meet the burden enunciated by the Sixth Circuit. In an abundance of caution, this Court granted defendants an additional 10 days in which to satisfy their burden. Defendants responded by requesting a nearly six-week extension of time. This was also granted by this Court;

f) On February 1, 1988, defendants filed, *inter alia*, new proposed findings fact and conclusions of law in an attempt to meet this burden. The proposed findings supported continued sealing of only a portion of the conflicts transcript. The remainder was ordered unsealed and is the subject of the instant motion to continue sealing pending appeal.

justification, clearly constitutes the type of substantial harm sought to be avoided by the rules limiting the stay of orders. Finally, as to the fourth prong, defendants will suffer no irreparable harm from the immediate unsealing of portions of the conflicts transcript. This is clear as, even though given numerous opportunities, defendants have failed to show that the portions of transcript to be unsealed contain information, the publication of which, will interfere with their right to a fair trial.

For these reasons, this Court finds that defendants have failed to show the need for a stay, pending appeal, of this Court's order unsealing portions of the conflicts transcript. The motion for stay of said order is therefore denied.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 6-3-88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al

Defendants

CASE NO. CR86-114

HON. GEORGE W.
WHITE

MEMORANDUM
AND ORDER

This matter is before the Court pursuant, in essence, to the motion of Applicants National Broadcasting Company, Inc. and WKYC-TV3 (hereinafter "Applicants") for the unsealing of the transcript of the July 10, 1986 attorney conflicts hearing (hereinafter "conflicts transcripts").¹ Defendants Presser and Hughes oppose the unsealing.

In accordance with the mandate of the Sixth Circuit Court of Appeal (*Application of National Broadcasting Company, Inc. and WKYC-TV3 (United States v. Presser)*, 828 F.2d 340 (6th Cir. 1987) (hereinafter "*Application of NBC*"), this Court makes the following findings of fact and conclusions of law regarding the unsealing of the conflicts transcript:

1. On June 13, 1986, the United States of America ("Government") filed a Motion for Inquiry into Conflicts of Defense Counsel ("Conflicts Motion") concerning alleged conflicts of interests faced by the attorneys for defendants Jackie Presser, Anthony Hughes, and Harold Friedman. In the Conflicts Motion, the

¹ The lengthy procedural history of this motion is discussed *infra*.

Government requested that the Court inquire into the existence of any potential conflicts of interest facing defense counsel.

2. On June 16, 1986, the attorneys for defendant Presser filed a motion to place the Government's Conflicts Motion for Inquiry and accompanying documents under seal on the alleged grounds that their release would generate prejudicial pretrial publicity.

3. On June 20, 1986, and July 10, 1986, Applicants filed applications to receive copies of all documents relating to the Court's inquiry into potential conflicts of interest of defense counsel, for access to the hearing on the Government's Conflicts Motion for Inquiry, and for a copy of the transcript of any such hearing. The applications invoked the First Amendment right of access to judicial proceedings and the common law right to inspect and copy judicial records.

4. On June 23, 1986, this Court issued an Order that, among other things, required that all documents relating to the Conflicts Motion remain under seal until further order of the court. On June 26, 1986, the attorney for defendant Friedman orally joined in Presser's request to keep all records pertaining to the Conflicts Motion under seal.

5. On June 26, 1986, at the completion of a hearing held in open court, this Court denied Applicant's application for access to the documents relating to the Government's Conflicts Motion. On June 27, 1986, the Court filed a Memorandum and Order to that effect. (Additional sealed documents requested by Applicants were also the subject of the June 26 hearing and a second June 27 Memorandum and Order.)

6. On July 3, 1986, Applicants filed a Motion for Reconsideration of this Court's two June 27, 1986 Memorandum and Orders in light of the United States Supreme Court's decision in *Press-Enterprise Co. v. Superior Court of California*, 54 U.S.L.W.

4869, 106 S.Ct. 2725 (1986), ("*Press-Enterprise II*"). On July 22, 1986, this Court filed a Memorandum and Order denying Applicants' Motion for Reconsideration of the two June 27, 1986 Orders.

7. On July 10, 1986, this Court conducted a hearing to consider Applicant's applications for access to all hearings held in connection with the Conflicts Motion. This Court ordered at that time that certain portions of these hearings be closed to the public.

8. Also on July 10, 1986, this Court conducted an *in camera* hearing on the record for the purpose of determining whether any actual or potential conflicts of interest required the disqualification of any of the defense counsel and to obtain the defendants' waiver of any such conflicts. At that time, the Court obtained waivers from defendants Presser and Hughes of any claim of prejudicial error arising out of any potential conflicts of interest involving their attorneys. (Hearings on the Government's Conflicts Motion were also held on July 11 and July 14, 1986.)

9. Applicants filed a timely Notice of Appeal from this Court's Orders of June 23, 1986, June 27, 1986 (two), July 10, 1986, and July 22, 1986 with the United States Court of Appeals for the Sixth Circuit.

10. On July 31, 1987, the United States Court of Appeals for the Sixth Circuit issued a decision vacating this Court's Orders of the above-listed dates and remanding the case to this Court for further proceedings. *Application of National Broadcasting Company, Inc. and WKYC-TV3 (United States v. Presser)*, 828 F.2d 340 (6th Cir. 1987) ("*Application of NBC*").

11. In its decision in *Application of NBC*, the Sixth Circuit Court of Appeals applied the two-part test employed in *Press-Enterprise II* for determining when the First Amendment right of access exists with respect to a particular pretrial criminal proceed-

ing. In considering whether the First Amendment right of access extended to the hearing, hearing transcript, and documents relating to the Conflicts Motion, the Sixth Circuit inquired into whether there had been a "tradition of accessibility" or the equivalent) to such proceedings, and whether public access to such proceedings "plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 106 S.Ct. at 2740; *Application of NBC*, 828 F.2d at 343-344.

12. Applying this two-part test to the documents and hearing transcript relating to the Conflicts Motion, the Sixth Circuit concluded that the First Amendment right of access extended to such materials. *Application of NBC*, 828 F.2d at 345. The Sixth Circuit Court of Appeals held:

Thus, as with the disqualification issue, we conclude that proceedings inquiring into conflicts of interest by attorneys meet and satisfy the requirements of a qualified First Amendment right of access. Although not "like a trial," in the sense of a preliminary hearing such as the court considered in *Press-Enterprise II*, both proceedings do require the court to make factual determinations and to apply settled legal principles in order to rule. In addition, resolution of the issues presented in both types of proceedings, has a significant bearing on all subsequent proceedings in a case, particularly on the trial itself. *Application of NBC*, 828 F.2d at 345.

In the same opinion, the Sixth Circuit held that the First Amendment right of access extended to certain other documents requested by Applicants.

13. The Court of Appeals opinion proceeded to confirm the proper test to be applied in determining when this First Amendment right of access can be overcome. The Sixth Circuit held:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve

that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Application of NBC, 828 F.2d at 343 (quoting from *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984) ("*Press-Enterprises I*").

14. Accordingly, under the Sixth Circuit and United States Supreme Court formulation, the First Amendment right of access guarantees the public and the press the right of access to all of the documents and transcripts relating to the Government's Conflicts Motion unless this Court: (1) concludes that an overriding and compelling countervailing interest exists; (2) makes specific findings on the record demonstrating that closure is essential to preserve this overriding interest; (3) finds that sealing this particular material will in fact be effective in protecting this overriding interest; (4) narrowly tailors the closure order to serve that interest; and (5) finds that no alternatives to complete closure exist. *Application of NBC*, 828 F.2d at 343-346; *Application of Storer Communications Inc. and WJW-TV8 (United States v. Presser)*, 828 F.2d 330 (6th Cir. 1987) ("*Application of Storer*"); *Press-Enterprise I*, 464 U.S. at 510; and *Press-Enterprise II*, 106 S.Ct. at 2743. The burden of satisfying this five-part test is clearly on the party seeking to overcome the "presumption of openness"; and in this instance the burden thus rests on defendants Presser and Hughes.

15. The Sixth Circuit remanded the case to this Court for a determination of whether the First Amendment right of access has been overcome with respect to the documents and transcripts relating to the Conflicts Motion. Upon application of the Sixth Circuit's guidelines, at a hearing held on September 29, 1987, this Court released all documents and transcripts relating to the Conflicts Motion, except that the Court reserved judgment on the issue of access to the transcript of the July 10 hearing. All parties

have since had an opportunity to submit proposed findings of fact and conclusions of law to this Court.

16. In its decision in *Application of NBC*, the Sixth Circuit provided certain guidelines for this Court to follow in considering the accessibility of the July 10 hearing transcript. The Sixth Circuit indicated that any information in the transcript which relates to the attorneys for the defendants, as opposed to the defendants themselves, should not remain under seal. *Application of NBC*, 828 F.2d at 347. Moreover, with respect to the defendant's claim that release of the transcript would damage their fair trial rights, the Court of Appeals noted that it is not true that all publicity is necessarily prejudicial to a defendant's right to a fair trial, and that any finding by a trial court that particular sealed information, if released, would infringe upon fair trial rights may not be made in a conclusory manner. *Application of NBC*, 828 F.2d at 344, 347. The Sixth Circuit stated that before a trial court is permitted to rule that particular information should be sealed in order to protect a defendant's fair trial rights, the court must first make specific findings that disclosure of the particular information involved would result in a substantial likelihood of prejudice to the fair trial rights, that closure is essential to preserve those rights and the proposed closure is narrowly tailored to do so, that no alternatives can adequately protect the fair trial rights, and that sealing the particular information will be effective in protecting the defendant's rights. *Application of NBC*, 828 F.2d at 347; see also *Associated Press v. United States District Court*, 705 F.2d at 1146; *United States v. Chagra*, 701 F.2d at 365.

17. This Court has reviewed the conflicts hearing transcript with these principles in mind and finds that the certain portions of the transcript shall remain sealed. Regarding these portions this Court finds that the defendants have shown, as specifically stated below, that those portions of the transcript contain information which if publicly released, is substantially likely to prejudice their

rights to a fair trial. They have thus met their burden of satisfying the five-part test referenced in paragraphs 14 and 16 above.

18. The portions of the transcript to remain sealed are as follows:

a) page 3, lines 11-14. This passage contains statements made by John R. Climaco, Esq., concerning defendant Presser's use of a particular defense. This statement refers to advice given on the decision of whether to use said defense. Also, particular ramifications of said use are referred to. These statements are therefore protected by the attorney-client privilege of confidentiality. This privilege constitutes an interest which is compelling and overrides the qualified right of pre-trial public access to these materials.

b) page 4, Lines 21-25; page 5, lines 12-14. This passage contains statements made by John R. Climaco, Esq., concerning facts underlying the development of a particular defense. Also contained therein are statements attributed to defendant Presser concerning these facts. Defendants state the facts referred to have never been released to the government. These statements are thus protected by the attorney-client privilege of confidentiality. This privilege constitutes an interest which is compelling and overrides the qualified rights of pre-trial public access to these materials.

c) page 6, lines 4-25; page 7, line 1. This passage contains statements by John R. Climaco, Esq., referring to statements made by defendants Presser and Hughes during the course of attorney-client discussions concerning the instant indictments. These referenced statements contain facts underlying a particular potential defense. Defendants state this information has never been revealed to the government. These statements are therefore protected by the attorney-client privilege of confidentiality. This privilege constitutes an interest which is compelling and overrides the qualified right of pre-trial public to these materials.

d) page 9, lines 9-10, 14-25; page 10, lines 1-6. This passage contains statements by John R. Climaco, Esq., referring to statements made by defendants Presser and Hughes during

the course of attorney-client discussions concerning the instant indictment. These referenced statements contain facts underlying a particular defense and facts underlying the mental state of the defendants concerning the use of a particular defense. Defendants state this information has never been released to the government. As noted above, these statements are protected by the attorney-client privilege of confidentiality and therefore constitute a compelling and overriding interest in this case.

e) page 17, lines 3-16. This passage contains statements by John R. Climaco, Esq., concerning the availability of specific, potential defense witnesses. Defendants state this information has not been released to the prosecution. Pretrial publication of this information would endanger the rights of defendants to due process of law by revealing said information to the prosecution prior to trial. This interest constitutes one which is compelling and overrides the qualified right of the public to pre-trial access to these materials.

f) page 24, lines 19-25; pages 25-26; page 27, lines 1-7. This passage contains statements made by defendant Presser to the Court. These statements contain specific facts underlying a potential defense which facts, defendants state, have not been revealed to the prosecution. The release to the public of this information prior to trial would endanger the rights of defendants to due process of law by revealing said information to the prosecution prior to trial. This interest constitutes one which is compelling and overrides the qualified right of the public to pre-trial access to these materials.

g) page 32, lines 16-21. This passage contains statements made by defendant Hughes to the Court. These statements refer to specific potential defense witnesses and to specific facts underlying a particular defense. Defendants state that this particular information has not been revealed to the government. Pre-trial publication of this information would endanger the rights of defendants to due process of law by revealing said information to the prosecution prior to trial.

19. Given the confidential nature of the above-described attorney-client communications and explicit defense data, this

Court finds that there is substantial likelihood that pretrial publication of such would prejudice the rights of defendants to a fair trial by revealing said information to the prosecution in advance of trial.

20. Given this danger, this Court concludes that the interest of defendants in the continued sealing of these portions of the conflicts transcript is compelling and countervailing and overrides the qualified right of the public to pre-trial access to this information.

21. Also, given that the danger to the above-noted compelling interest stems from the fact that publication would necessarily release to the prosecution prior to trial confidential information, this Court finds that sealing said portions of the conflicts transcript is essential to the preservation of said compelling interest.

22. For the same reasons, this Court finds that no ~~alternative~~ method exists for preserving said interests. Specifically, the mechanisms of voir dire, trial continuance and change of venue would fail to alleviate the problems caused by pretrial publication as such clearly would not operate to keep the confidential information from the prosecution.

23. Closure, in the form of sealing said portions of the transcript until after trial, obviously will be effective in preventing pre-trial release of such information to the prosecution. As such, it will also be effective in protecting the above-stated compelling due process interests of the defendants.

24. This Court has closely scrutinized the entire conflicts transcript and has selected for continued sealing only those lines and pages which clearly contain confidential information protected by the above-noted compelling interests. As such, this sealing order is as narrowly tailored as is possible to protect only those interests.

25. Accordingly, this Court orders that the above-noted portions of the July 10, 1986 conflicts hearing are to remain sealed until after the conclusion of the instant trial. The remainder of the transcript is to be released and made available for public access and review.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 6-3-88

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO**

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

JACKIE PRESSER, et al.,

Defendants.

CR No. CR-86-114

**JUDGE GEORGE W.
WHITE**

**MOTION OF DEFENDANT, HAROLD FRIEDMAN,
FOR LEAVE TO FILE A REPLY BRIEF TO THE
GOVERNMENT'S RESPONSE TO THE DEFENDANT
FRIEDMAN'S MOTION TO DISMISS**

The defendant, Harold Friedman, hereby respectfully moves for leave to file a reply brief on or before June 17, 1988 in support of his application for a motion to dismiss the charges against him, in opposition to the Government's response to the motion to dismiss. The reply brief is necessary to respond to assertions made in the filings by the Government and to additionally clarify the record in view of the updated information concerning the health of Jackie Presser as developed before this Court on June 7, 1988.

The defendant, Friedman, also respectfully intends to submit a response to the Government's motion to quash the five (5) pretrial subpoenas served by the defendant, Friedman.

The defendant notes for the Court that he did not receive the Government's response to the motion to dismiss nor the Government's motion to quash until the morning of June 6, 1988. Although the Certificate of Service indicates that these papers

**MOTION GRANTED.
IT IS SO ORDERED.**

JUDGE /s/George W. White

ENTERED: 6/16/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA
Plaintiff

vs.

JACKIE PRESSER, et al.,
Defendants

CASE NO. CR86-114

HON. GEORGE W.
WHITE

ORDER

This matter is before the Court pursuant to the motion of defendants Hughes and Friedman for an order allowing them to take the deposition of co-defendant Presser and for a continuance of the trial date until such deposition is completed. Movants, relying on Rule 15(a) of the Federal Rules of Criminal Procedure, argue that because Presser's testimony is critical to movants' defense and because Presser is unavailable for trial due to his health problems, "exceptional circumstances" exist herein which require the taking of such deposition. Additionally, movants argue that a continuance of sixty days, with a reevaluation at that time, of Presser's ability to submit to deposition is reasonable in light of current medical evidence regarding the likelihood of improvement in Presser's health.

The government does not oppose the taking of the deposition. It does, however, oppose the apparently indefinite trial continuance requested by movants. Also citing current medical evidence, the government argues that movants have not made the required showing that Presser will be available for deposition within a reasonable time.

After consideration of the briefs submitted and the case law cited therein, this Court concludes that the taking of the deposition of

Jackie Presser is proper pursuant to Rule 15(a) of the Federal Rules of Criminal Procedure. The motion to take the deposition is therefore granted.

The motion for continuance, however, is not well-taken. In order to justify the granting of a trial continuance for the purposes of taking a deposition, the movant must show, *inter alia*, that the witness is or will be, available within a reasonable time for the taking of such deposition. *U.S. v. Boyd*, 620 F.2d 129, 132 (6th Cir.), *cert denied*, 449 U.S. 843 (1980). Given the current state of the medical evidence before it, this Court finds that movants have not satisfied this burden. For this reason, the motion for continuance of the trial date is denied.

IT IS ORDERED that movants may take the deposition of Mr. Presser at any time between the date of the instant order and July 11, 1988. It is further ordered that prior to taking such deposition, movants must supply this Court with medical evidence of Jackie Presser's physical and mental competence to give such deposition.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 6-21-88

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,
v.

CASE NO. CR 86-114
JUDGE GEORGE W.
WHITE

JACKIE PRESSER, ET AL.,
Defendants.

ORDER

On the 24th day of June 1988, this matter came to be heard upon the Petition of Bernard A. Smith, Special Attorney, United States Department of Justice, for a Writ of Habeas Corpus Ad Testificandum directed to Sheriff Gerald T. McFaul, Cuyahoga County Jail, Cleveland, Ohio, and/or the United States Marshal at Cleveland, Ohio.

The Court, being fully advised in this matter, finds that JOHN A. NARDI, JR., a/k/a JACK NARDI (Identification Number 880115036), is detained at the Cuyahoga County Jail, Cleveland, Ohio, under the custody of said Sheriff.

The Court further finds that the said JOHN A. NARDI, JR., a/k/a JACK NARDI, is required in the jurisdiction of the United States District Court, Northern District of Ohio, Eastern Division, in order that JOHN A. NARDI, JR., a/k/a JACK NARDI, may testify in the above-captioned case during a pre-trial hearing scheduled by this Court on June 29, 1988 at 10:00 a.m.

Accordingly, it is ordered that the Writ of Habeas Corpus Ad Testificandum shall issue and that the Writ be delivered to Sheriff

A-282

Gerald T. McFaul, Cuyahoga County Jail, Cleveland, Ohio,
and/or to the United States Marshal at Cleveland, Ohio.

/s/ George W. White

UNITED STATES DISTRICT
COURT JUDGE

June 24, 1988

ENTERED: 6/24/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACKIE PRESSER, *ET AL.*,

Defendants.

CASE NO. CR 86-114

JUDGE GEORGE W.

WHITE

ORDER

On June 29, 1988, this Court continued the trial date in the above-captioned case for defendants Harold Friedman and Anthony Hughes until October 11, 1988, in order to permit substitute counsel for defendant Hughes to prepare for trial. At that time, the United States orally notified the Court that it already had issued numerous trial subpoenas for the July 12, 1988 trial date to persons who it intended to call as witnesses at trial. The government requested this Court to enter an order stating that the government's trial subpoenas remain in effect but continuing the return date of the subpoenas until October 11, 1988.

In view of the government's oral request, IT IS ORDERED that all trial subpoenas requiring witnesses to appear to testify at the trial in this case scheduled for July 12, 1988 and already served upon said witnesses by the government remain in effect but that the subpoenas are continued until October 11, 1988. The government shall provide a copy of this order to the subpoenaed witnesses by either personal service or mail.

SO ORDERED.

A-284

/s/George W. White
UNITED STATES DISTRICT
JUDGE

DATE July 1, 1988

ENTERED: 7-6-88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al,

Defendants

CASE NO. CR86-114

HON. GEORGE W.

WHITE

ORDER

On June 22, 1988 this Court held an *in camera* hearing to determine whether a conflict of interest exists such as to justify the withdrawal of Michael L. Climaco and Thomas M. Wilson as counsel for defendant Anthony Hughes. In accordance with the mandate of the Sixth Circuit Court of Appeals (*Application of National Broadcasting Company, Inc. and WKYC-TV3 (United States v. Presser)*, 828 F.2d 340 (6th Cir. 1987) (hereinafter, "*Application of NBC*"), this Court makes the following findings of fact and conclusions of law regarding the unsealing of the transcript of such hearing (hereinafter referred to as the "1988 conflicts transcript").

1) On June 21, 1988 Michael L. Climaco and Thomas M. Wilson, counsel for Anthony Hughes, filed a motion to withdraw as counsel of record for Anthony Hughes in the instant proceedings. The motion requested that an *in camera* hearing on the issue be held as discussion of the reason for withdrawal would require discussion of a potential defense. In support of this request defense counsel cited the cases of *Press-Enterprise Co. v. Superior Court of California*, ___U.S.___, 106 S.Ct. 2725 (1986) ("*Press-Enterprise*"); *Application of Storer Communications, Inc., WJW-TV8*, 828 F.2d 330, 336 (6th Cir. 1987) and *Application of NBC*, 828 F.2d at 343.

2) A status conference on the instant case was held on June 21, 1988 at which the instant motion was discussed. Said status conference was continued on June 22, 1988. In discussing the need for an *in camera* hearing regarding the basis for the withdrawal motion, defense counsel Climaco and Wilson explained that they could not elaborate in public upon these bases without endangering the rights of defendant Hughes to the confidentiality of attorney-client communications and to fair trial. At the conclusion of said conference this Court ruled that an *in camera* hearing was necessary to resolve the issue regarding the existence of a conflict.

3) The *in camera* hearing was held immediately. Counsel for defendants Hughes and Friedman were present and discussed the alleged conflict and its effect on each of the two defendants. The transcript thereof is the subject of the instant order regarding unsealing.

4) The Sixth Circuit Court of Appeals has held that proceedings inquiring into conflicts of interests by attorneys meet and satisfy the requirements for a qualified First Amendment Right of access. That is, such proceedings traditionally have been open to the public and such public access plays a significant positive role in the functioning of such process. *Application of NBC*, 828 F.2d at 343-345, citing *Press-Enterprise II*, 106 S.Ct. at 2740.

5) Once such a qualified right of public access is established, it can be overcome only by the finding that a) an interest overriding that of public access exists; b) closure i.e., sealing, is essential to preserve that overriding interest; c) sealing the particular material will, in fact, be effective in protecting that interest; d) the sealing order can be and is narrowly tailored to serve that interest; and e) no alternatives to complete closure exist. *Application of NBC*, 828 F.2d at 343-346. The burden of satisfying this five-part

test is on the party seeking to overcome the presumption of openness.

6) This Court has reviewed the transcript of the 1988 conflicts hearing with these principles in mind and finds that certain portions of the transcript shall remain sealed. In coming to its conclusion this Court has considered the arguments for the *in camera* procedure advanced by defendant Hughes in the motion for withdrawal of counsel, the arguments of defendant Hughes made during the above-noted open hearings on this issue, the arguments against closure advanced at said hearings by the government and by counsel for the media, and the brief supporting the unsealing of the instant conflicts transcript filed by the National Broadcasting Company and WKYC-TV3. Regarding those portions to remain sealed, this Court finds that defendants Hughes and Friedman have shown, as specifically stated below, that those portions contain information which, if publicly released, is substantially likely to prejudice their rights to a fair trial. They have thus met burden of satisfying the five-part test referenced in paragraphs four and five above.

7) The portions of the transcript to remain sealed are the following:

- Page 4, lines 7-8, 10-13, 23-25;
- page 5, lines 1-5;
- page 6, lines 13, 23-24;
- page 7, lines 9-11;
- page 9, lines 13-17, 23-25;
- pages 10-12; and
- page 13, lines 1-5, 9, and 16-18.

These passages contain statements by Michael L. Climaco, Esq. and Paul J. Cambria, Esq. concerning facts underlying a potential specific defense, the reasons for using that defense, and specific potential trial tactics in the use of that defense. Counsel

for defendants state this information has never been released to the government.

8) Given the confidential nature of the above-described explicit defense data, this Court finds that there is a substantial likelihood that pretrial publication of such would prejudice the rights of defendants to a fair trial by revealing said information to the prosecution in advance of trial.

9) Given this danger, this Court concludes that the interest of defendants in the continued sealing of these portions of the 1988 conflicts transcript is compelling and countervailing and overrides the qualified right of the public to pretrial access to this information.

10) Also, given that the danger to the above-noted compelling interest stems from the fact that publication would necessarily release to the prosecution prior to trial confidential information, this Court finds that sealing said portions of the conflicts transcript is essential to the preservation of said compelling interest.

11) For the same reasons, this Court finds that no alternative method exists for preserving said interests. Specifically, the mechanisms of voir dire, trial continuance and change of venue would fail to alleviate the problems caused by pretrial publication as such clearly would not operate to keep the confidential information from the prosecution.

12) Closure, in the form of sealing said portions of the transcript until after trial, obviously will be effective in preventing pretrial release of such information to the prosecution. As such, it will be effective in protecting the above-stated compelling due process interests of the defendants.

13) This Court has closely scrutinized the entire conflicts transcript and has selected for continued sealing only those lines and

pages which clearly contain confidential information protected by the above-noted compelling interests. As such, this sealing order is as narrowly tailored as is possible to protect only those interests.

14) Accordingly, this Court orders that the above-noted portions of the 1988 conflicts transcript are to remain sealed until after the conclusion of the instant trial. The remainder of the transcript is to be released and made available for public access and review.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 7-12-88



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al

Defendants

CASE NO. CR86-114

HON. GEORGE W.

WHITE

ORDER

This matter is before the Court pursuant to the motions¹ of Intervenor National Broadcasting Company, Inc., and WKYC-TV3 (hereinafter "Intervenor") for access to sealed judicial records and transcripts.

The access requests contained in the instant motions can be grouped into four categories: (1) requests for access to sealed documents that do not exist, (2) requests for access to documents which this Court has ordered the government to submit for the Court's *in camera* Brady review (*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)), (3) requests for access to transcripts and video tapes of witness depositions, and (4) duplicate requests.

A.) Requests for Sealed Documents that Do Not Exist.

¹ It is unclear whether definitive rulings have been made on the several access requests contained in Intervenor's Application for Access to Sealed Judicial Records and Transcripts filed September 28, 1987. (Hereinafter "September Motion"). This order will, therefore, address those access requests as well as the access requests contained in the Intervenor's Application for Access to Sealed Judicial Records and Transcripts Relating To Defendant Presser's Motion To Continue the Trial Date filed March 18, 1988 (Hereinafter, "March Motion").

Requests numbered one through three of the September Motion and requests two and three of the March Motion pertain to documents and transcripts which do not exist under seal. Said requests are therefore denied.

B.) Requests for Documents Submitted by the Government, pursuant to this Court's Order, for In camera Brady review.

Requests numbered four through six of the September Motion pertain to documents submitted to this Court by the government for this Court's *in camera Brady* review. This Court concludes that there is no qualified right of public access to documents submitted for such *Brady* review. The plurality opinion on this issue of the Sixth Circuit Court of Appeals in the case of *Application of Storer Communications, Inc., WJW-TV8, (United States v. Presser)*, 828 F.2d 330 (6th Cir. 1987) does not require a contrary conclusion. Intervenors' requests numbered four through six of the September Motion are therefore denied.

C.) Requests for Access to Transcripts and Videotapes of Witness Depositions.

Request number nine of the September Motion and request number one of the March Motion pertain to records of the depositions of Allen Friedman, Dr. Marc Lee and Dr. Joseph Zabramski respectively. The law is clear that there is no qualified right of access to videotaped or transcribed deposition testimony which has not yet been admitted into evidence at trial. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 396, 99 S.Ct. 2898, (1979) (Burger C.J., concurring); *U.S. v. Beckham*, 789 F.2d 401, 411 (6th Cir. 1986); *In re Application of WFMJ Broadcasting Co.*, 566 F.Supp. 1036, 1040 (N.D. Ohio 1983); and see Fed.R.Crim.P., Rules 15(d) and 30(f).

The instant depositions have not, as yet, been admitted into evidence in the pending trial. As such, no right of public access

thereto exists. Intervenor's requests for these materials are therefore denied.

D.) Duplicate Requests.

Requests number ten and eleven of the September Motion and requests numbered four and five of the March Motion essentially duplicate the previously discussed requests. They are thus denied for the foregoing reasons. These requests also pertain to documents which may be filed under seal in the future. The propriety of the sealing of documents submitted to the Court in the future can only be addressed on a document-by-document basis at the time such sealing issues actually arise. Intervenor's request for an advance ruling on such issues is therefore denied.

For the foregoing reasons, Intervenor's requests for access are denied.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 7-12-88

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACKIE PRESSER, ET AL.,

Defendants.

CASE NO. CR 86-114

JUDGE GEORGE W.

WHITE

**MOTION TO SEAL DOCUMENTS SUBMITTED TO
THE COURT**

The United States of America, through its undersigned attorneys, moves this Court to seal the following documents submitted to the Court for its *in camera* review pursuant to the Court's order at a hearing conducted June 16, 1987:

- (1) results of FBI polygraph examination of Robert S. Friedrich administered on January 7, 1986, consisting of 3 pages,
- (2) transcript of interview of Robert S. Friedrich conducted by the Office of Professional Responsibility on January 8, 1986, consisting of 196 pages,
- (3) transcript of interview of Robert S. Friedrich conducted by the Office of Professional Responsibility on January 9, 1986, consisting of 125 pages,
- (4) transcript of interview of Robert S. Friedrich conducted by the Office of Professional Responsibility on January 13, 1986, consisting of 105 pages.

- (5) memorandum from Stephen H. Jigger to Paul E. Coffey, dated April 11, 1985, consisting of eleven pages plus attachments,

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 7/12/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JACKIE PRESSER, *ET AL.*,
Defendants.

CASE NO. CR
86-114

JUDGE GEORGE
W. WHITE

MOTION TO SEAL DOCUMENTS SUBMITTED TO
THE COURT

The United States of America, through its undersigned attorneys, moves to seal the following documents submitted to the court for its *in camera* review: (1) FBI Airtel, consisting of five pages, dated June 18, 1983, (2) internal governmental memorandum consisting of twelve pages, dated April 11, 1985, and (3) FBI Airtel, consisting of two pages, dated November 7, 1983 (two versions).

In support of its motion, the government represents as follows:

(a) At a pretrial status call conducted on September 1, 1987, the court requested the government to provide to the Court for its *in camera* review three documents: (1) FBI Airtel, consisting to five pages, dated June 18, 1983, (2) internal governmental memorandum consisting of twelve pages, dated April 11, 1985, and (3) FBI Airtel, consisting of two pages, dated November 7, 1983.

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 7/12/88

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACKIE PRESSER, ET AL.,

Defendants.

CASE NO. CR 86-114

**JUDGE GEORGE W.
WHITE**

**GOVERNMENT'S MOTION TO DISMISS AS TO
DEFENDANT JACKIE PRESSER ON SUGGESTION
OF DEATH**

The United States of America, through its undersigned attorneys, moves to dismiss in the above-captioned case as to defendant Jackie Presser, inasmuch as Presser died on July 9, 1988 (see Death Certificate, attached hereto as Exhibit A).

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 7/19/88

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, ET AL.

Defendants

CASE NO. CR 86-114

JUDGE GEORGE W.

WHITE

ORDER

This cause came on for hearing on this 29th day of June, 1988, before Judge George W. White. Before the Court was the issue of any conflict existing between Elmer A. Giuliani and his son, Albert A. Giuliani, who presently represents a material witness in the case, Jack Nardi, Jr. After a full hearing testimony was taken from Elmer A. Giuliani, Albert A. Giuliani, and Jack Nardi, Jr. the Court is convinced and concludes that no conflict exists.

The Court made further inquiry at the request of the government, whether defendant Anthony Hughes had a conflict on the matter referred to above, and after being questioned, defendant Anthony Hughes waived any present conflict or any that may arise and possibly in the future. The Court being satisfied, accepted the waiver of Defendant Anthony Hughes in open court.

Upon request of the Court, new counsel for Anthony Hughes, Elmer A. Giuliani and Rocco J. Russo indicated to the Court that it is necessary in order to prepare the case of, United States of America vs. Anthony Hughes, that they would need four months to adequately prepare the within case.

As a result of the hearing on this matter, The Court continued the within case, until October 11, 1988 for trial. It is further or-

dered counsel for both sides prepare Jury Questionnaires, to be discussed in open court on September 6, 1988.

It is further ordered by the Court, that the firm of Climaco, Climaco, Seminatore, Lefkowitz & Garofoli, remain as attorneys of record, on the case until new counsel Elmer A. Giuliani and Rocco J. Russo informs the Court that the firm of Climaco, Climaco, Seminatore, Lefkowitz & Garofoli, is no longer needed for preparation of the trial.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 7-20-88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

JACKIE PRESSER, et al

Defendants

CASE NO. CR86-114

HON. GEORGE W.
WHITE

MEMORANDUM
AND ORDER

This matter is before the Court pursuant to the motion of defendant Harold Friedman to dismiss the indictment against him or, in the alternative, to enforce compliance with certain pretrial subpoenas. Defendant Friedman contends that he cannot receive a fair trial because of 1) the unavailability of an essential witness, i.e., Jackie Presser, 2) the unavailability of the FBI files detailing the activities of Jackie Presser and Anthony Hughes, (hereinafter the "10,000 documents") and 3) the declination, by several current and former government agents, of defense requests for interviews. Based on these circumstances, defendant Friedman contends he will be denied his Rights to due process of law (Fifth Amendment), to compulsory process (Sixth Amendment) and to adequately prepared counsel (Sixth Amendment). Because of these circumstances, defendant Friedman argues, either the indictment must be dismissed or the subpoenas duces tecum for the 10,000 documents must be enforced.

The government opposes the motion to dismiss the indictment arguing that none of the grounds advanced by defendants support dismissal. Additionally, the government opposes the enforcement of the subpoenas duces tecum for the 10,000 documents, arguing,

inter alia, that the standard for enforcement of such has not been satisfied.

A) *The Dismissal Motion* — This Court has considered each of the claimed constitutional violations advanced by defendant Friedman and concludes that no such violations have occurred.

First, the denial of access to the FBI informant files of co-defendants Presser and Hughes (hereinafter “the 10,000 documents”) does not constitute an unconstitutional limitation on defendant Friedman’s ability to present a complete defense. Access to the 10,000 documents has been previously considered and ruled upon several times by this Court. It has been ordered that defendant Friedman be given all materials contained in the 10,000 documents to which he is entitled pursuant to the *Brady* doctrine (*Brady v. Maryland*, 373 U.S. 206, 83 S.Ct. 1194 (1963)) and pursuant to Rule 16 of the Federal Rules of Criminal Procedure. The government states it has complied with these orders and has turned over such materials to defendant Friedman. Additionally, defendant Friedman has been informed of the identities of persons whose testimony allegedly will support a defense of “authorization”. As to the portions of the 10,000 documents not ordered produced, defendant Friedman has failed to show that he is legally entitled to such.

In sum, defendant Friedman has been authorized to discover all of the 10,000 documents to which he is entitled by the *Brady* doctrine, and Rule 16 of the Federal Rules of Criminal Procedure. Defendant Friedman has not advanced authority supportive of the conclusion that he is entitled to any further discovery or that the above-noted Rules are unconstitutional. In this regard, it is specifically noted that the Sixth Circuit has recently held that in most criminal prosecutions the *Brady* Rule, Rule 16 and the Jencks Act (18 U.S.C. §3500) exhaust the universe of discovery to which the defendant is entitled. *United States v. Presser*, slip op. No. 87-3896 at 22. (6th Cir. filed April 25, 1988). As such, this

Court concludes that the denial of further access to the 10,000 documents does not constitute a violation of defendant Friedman's right to due process of law.

Second, no violation of defendant Friedman's Sixth Amendment right to compulsory process has occurred by reason of co-defendant Presser's potential unavailability as a witness for trial or by the refusal of current and former government agents to speak with the defendant.

In order to establish a Compulsory Process Clause Violation, a criminal defendant must establish more than the mere absence of testimony. *United States v. Hoffman*, 832 F.2d 1299, 1303 (1st Cir. 1987). The defendant must identify some act or omission, attributable to the government, which causes the loss of material testimony favorable to the defendant. *United States v. Hoffman*, 832 F.2d at 1303; *see also United States v. Lenz*, 616 F.2d 960, 962, (6th Cir.), *cert. denied*, 447 U.S. 929 (1980) (government may not act to prevent an otherwise willing witness from testifying for the defendant). Finally, it must be noted that,

A defendant has no absolute right to elicit testimony from any witness, co-defendant or not, whom he may desire. Indeed, the witness may be unavailable to him for many reasons, e.g., death, incapacity, presence outside the range of legal process, and commonly, the refusal of the witness to testify pursuant to a claim of privilege

United States v. Gay, 567 F.2d 916, 919 (9th Cir.), *cert. denied*, 435 U.S. 999 (1978). Defendant Friedman's claim that the unavailability of co-defendant Presser as a witness and the refusal of other potential witnesses to be interviewed constitutes an infringement on his compulsory process rights fails because defendant Friedman has not shown that such unavailability is attributable to the government. Indeed, defendant Friedman specifically states the unavailability of co-defendant presser is due to co-

defendant Presser's poor medical condition,¹ not to any act by the government. Additionally, defendant Friedman has made no showing that the refusal of government employees to be interviewed is due to government action. As such, this Court finds that no denial of the constitutional right to compulsory process has occurred.

Defendant Friedman's third claim, that, as a result of the unavailability of the 10,000 documents and of co-defendant Presser and the others, he is being deprived of his Sixth Amendment right to effective and prepared counsel, necessarily fails as it is dependent upon the finding of a constitutional violation in the above two contexts. As this Court has found no constitutional violation therein, then no Sixth Amendment violation can have occurred.

In sum, this Court finds that no violation of defendant Friedman's constitutional rights has occurred or will occur as a result of the lack of access to the remainder of the 10,000 documents or the potential unavailability of co-defendant Presser or the former and current government employees as witnesses. Defendant Friedman's motion to dismiss the indictment against him is therefore denied.

B) The Motion of Defendant Friedman for Enforcement of Subpoenas Duces Tecum for the "10,000 Documents" — As an alternative to dismissal of the indictment defendant Friedman seeks pretrial production of the FBI files of co-defendant's Presser and Hughes pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure. Defendant Friedman argues he has satisfied the four-part test necessary for enforcement of a Rule 17(c) subpoenas duces tecum. This test requires that the movant show 1) that specific documents are sought and that such are evidentiary and relevant; 2) that they are not otherwise procurable reasonably in advance of

¹ /The motion to which this order refers was filed before the demise of co-defendant Presser.

trial by the exercise of due diligence; 3) that the movant cannot properly prepare for trial without such production and inspection in advance of trial and that failure to obtain pretrial inspection may unreasonably delay the trial; and 4) that the motion is made in good faith and is not intended as a general "fishing expedition". *United States v. Nixon*, 418 U.S. 700, 94 S.Ct. 3090, 3103 (1974).

The government opposes enforcement of the subpoenas duces tecum and moves to quash said subpoenas.

This Court has considered the arguments advanced by both parties as well as the legal authorities cited therein and has concluded that movant has not met his burden of proof. Specifically, as to the second prong of the above-noted test, this Court is not convinced that the information sought is not procurable reasonably in advance of trial through other sources. In this regard, movant lists a number of persons who have declined defense interviews, but also notes that one presumably well-informed individual, Oliver Revell, Executive Assistant Director of Investigations of the FBI has agreed to an interview and that another (Martin McCann, a key former FBI agent) has not yet decided whether to be interviewed. Additionally, movant has not shown that he has been unable to obtain the requested information through the sources he has successfully tapped. Also, as to the third prong of the above-noted test, this Court is not convinced that movant is unable to adequately prepare for trial without the pretrial receipt of these documents. As noted in the discussion concerning the the motion to dismiss, movant has received those portions of the 10,000 documents which are exculpatory of him pursuant to the *Brady* rule and has received all statements contained therein which are required by Rule 16 of the Federal Rules of Criminal Procedure. It does not appear, therefore, that the third prong of the test is satisfied.

For the reasons state above, this Court concludes that enforcement of the subpoenas duces tecum served pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure is not appropriate. The motion to enforce the subpoenas duces tecum is therefore denied and the government's motion to quash said subpoenas is granted.

In sum, defendant Friedman's motion to dismiss is denied. Additionally, the motion of the government to quash the subpoenas duces tecum is granted.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

ENTERED: 7-20-88

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 88-3074

MIKE CONWAY, JUDY THOMPSON and TED
SCHWARTZ,

Intervenors-Applicants Appellants.

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

JACKIE PRESSER, HAROLD FRIEDMAN and
ANTHONY HUGHES,

Defendants-Appellees.

Before: LIVELY and JONES, Circuit Judges; and PECK, Sen-
ior Circuit Judge

J U D G M E N T

ON APPEAL from the United States District Court for the
Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said
district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered
and adjudged by this court that the judgment of the said district
court in this case be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER
OF THE COURT

Leonard Green, Clerk

/s/ Leonard Green

Clerk

Issued as Mandate: August 11, 1988

A True Copy.

COSTS:

None

Attest:

Filing fee \$

Printing \$

Total \$

/s/Garry McCarthy

Deputy Clerk

ENTERED: 8-15-88

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 88-3074

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**MIKE CONWAY, JUDY
THOMPSON, and TED
SCHWARTZ,**

*Intervenor
Applicants-Appellants*

**ON APPEAL from the
United States District
Court for the Northern
District of Ohio.**

v.

**UNITED STATES OF AMERICA,
*Plaintiff-Appellee,***

**JACKIE PRESSER, HAROLD
FRIEDMAN, and ANTHONY
HUGHES,**

Defendants-Appellees.

Decided and Filed June 20, 1988

**Before: LIVELY and JONES, Circuit Judges; and PECK,
Senior Circuit Judge.**

PER CURIAM. This is an appeal by professional broadcast journalists from an order of the district court denying their motion as intervenors in the criminal prosecution of Jackie Presser and others for permission to telecast, broadcast and photograph

the trial which is scheduled to begin in July 1988. This court granted an expedited appeal, and oral arguments were presented to the panel on Friday June 17, 1988.

The district court denied the motion in reliance on Rule 53 of the Federal Rules of Criminal Procedure and Rule 11.01 of the local rules of the district court. The intervenors-appellants argued in the district court and in this court that the two rules, which absolutely prohibit the broadcasting, telecasting and photographing of judicial proceedings, violate the First Amendment. The question is whether this prohibition impermissibly infringes on the right of access to judicial proceedings guaranteed by the First Amendment. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

As counsel for the appellants conceded at oral argument, the rules do not deny professional broadcast journalists and photographers access to the court room where the trial will be conducted. What appellants argue is that the rules place restrictions on that right of access which do not satisfy the requirement that such regulations be reasonable as to time, place and manner.

The very issue presented in this appeal has been decided by at least three federal circuit courts of appeals, and in each instance the constitutionality of Rule 53 has been upheld.¹ See *United States v. Hastings*, 695 F.2d 1278 (11th Cir.), cert. denied sub nom. *Post-Newsweek Stations, Florida, Inc. v. United States*, 461 U.S. 931 (1983); *United States v. Kerley*, 753 F.2d 617 (7th Cir. 1985); *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986). We agree with these rulings. In a different context, this court recently dealt with the right of access in *United States v. Beckham*, 789 F.2d 401, 406 (6th Cir. 1986) (media's right of access

¹ Since the local rule contains the same absolute prohibition as Rule 53, we need not discuss it separately.

consists of "a right to be present" and the "rights to speak and to publish concerning what takes place at a trial," quoting *Richmond Newspapers*, 448 U.S. at 576-78).

The fact that the Supreme Court held in *Chandler v. Florida*, 449 U.S. 560 (1981), that the Constitution does not require a prohibition against broadcasting, telecasting and photographing criminal trials is a far cry from holding that the Constitution does require that these activities be permitted during judicial proceedings.

The judgment of the district court is affirmed.

ENTERED: 8-15-88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA

Plaintiff

-v-

CASE NO. CR-86-114

JUDGE GEORGE W.

WHITE

JACKIE PRESSER, et al.

Defendants

MOTION OF MICHAEL L. CLIMACO AND THOMAS
M. WILSON FOR LEAVE TO WITHDRAW AS
COUNSEL FOR ANTHONY HUGHES

Now come Michael L. Climaco and Thomas M. Wilson, counsel for Anthony Hughes, and respectfully request leave of Court to withdraw as counsel of record for Anthony Hughes in the instant proceedings. Counsel's request to withdraw involves a discussion of defenses which will be presented at trial by the defendants. Therefore, it is requested that counsel be allowed to present the factual basis and arguments in support of this request *in camera*, and that the transcript of the *in camera* hearing be sealed until the conclusion of the trial in this matter.

In applying the two-part test employed in *Press-Enterprise Co. v. Superior Court of California*, 106 S. Ct. 2725

MOTION GRANTED.

Conditionally

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 9/1/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO: EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

Case No. CR86-114

Hon. George W. White

vs.

JACKIE PRESSER, et al.,
Defendants.

MOTION FOR RECONSIDERATION OF ORDER
QUASHING PRETRIAL SUBPOENAS

On May 20, 1988, defendant Harold Friedman filed a motion for dismissal or, in the alternative, for an order directing compliance with a pretrial subpoena. On June 3, the Government filed a response to the motion to dismiss and a motion to quash the pretrial subpoenas. On July 20, this Court filed an order denying enforcement of the pretrial subpoenas and granting the Government's motion to quash. Defendant Friedman asks that this Court reconsider that order for the following reasons.

The Court quashed the pretrial subpoenas based on problems it perceived in the defendant's showing that the documents sought were not otherwise procurable in advance of trial. Specifically, it noted that the defendant had been granted one interview (out of more than 25 requests) by the "presumably well-informed" Olive Revell, Executive Assistant Director of Investigations of the Federal Bureau of Investigation (FBI), and had not yet been absolutely foreclosed from interviewing Martin McCann, a key former FBI agent.*

* Friedman's counsel informed the court that Mr. McCann was in the process of changing counsel at the time he was initially

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**MOTION DENIED.
IT IS SO ORDERED.
JUDGE /s/George W. White
ENTERED: 9/6/88**

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

CASE NO. CR
86-114

v.

**JUDGE GEORGE
W. WHITE**

HAROLD FRIEDMAN, ET AL.,
Defendants.

**GOVERNMENT'S MOTION TO QUASH CERTAIN
TRIAL SUBPOENAS OF DEFENDANT FRIEDMAN**

The United States of America, through its undersigned attorneys, requests this Court to quash four trial subpoenas for documents issued on behalf of defendant Friedman to the following persons:

- (1) Edwin Meese, III, Attorney General of the United States,
- (2) David Margolis, Chief of the Organized Crime and Racketeering Section, Criminal Division,
- (3) Patrick M. McLaughlin, United States Attorney for the Northern District of Ohio,
- (4) Stephen H. Jigger, Acting Attorney-in-Charge, Cleveland Strike Force.

Each subpoena commands that on October 11, 1988 at 9:30 a.m., the subject of the subpoena produce the following documents:

Any and all documents, memoranda or other notations detailing information provided by Jackie Presser and Anthony Hughes for the time

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MOTION GRANTED.
IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 9/6/88

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

vs.

ANTHONY HUGHES,

Defendants.

CASE NO. CR 86-114

**JUDGE GEORGE W.
WHITE**

**MOTION FOR RECONSIDERATION OF MOTION
FILED ON APRIL 30., 1987 STYLED AS MOTION OF
DEFENDANT FOR AN ORDER REQUIRING THE
GOVERNMENT TO GIVE NOTICE OF ITS
INTENTION TO USE EVIDENCE OF OTHER
CRIMES, WRONGS OR BAD ACTS WHICH THE
COURT OVERRULED BY AN ORDER DATED
AUGUST 21, 1987**

Now comes the defendant, Anthony Hughes, by and through his attorneys, Elmer A. Giuliani and Rocco Russo, and pursuant to Rules 12(d)(2) and 16(a)(1)(C) of the Federal Rules of Criminal Procedure moves for an order requiring the government to give notice of its intention to use at trial, in its case-in-chief during cross-examination of the defendants or in its rebuttal case, the following materials:

1. Evidence of "other crimes, wrongs or acts" of the defendants, as that phrase is used in Fed. R. Evid. 404(b) with respect to this notice, the government should identify, describe and produce:

(a) the dates, times, places and persons involved in said other crimes, wrongs, or acts;

(b) the statements of each participant in said other crimes,
wrongs or acts:

MOTION DENIED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 9/6/88

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACKIE PRESSER, et al.,

Defendants.

CASE NO. CR 86-114

**JUDGE GEORGE W.
WHITE**

**MOTION FOR
CONTINUANCE**

Now comes defendant, Anthony Hughes, by and through his attorneys, and respectfully requests this honorable Court for a continuance of the trial of the matter herein from October 11, 1988, for a reasonable period of time in accordance with the following reasons:

1. On June 29, 1988, counsel herein appeared in open court and requested an extensive continuance from the Court, which was granted because counsel, after being apprised verbally by prior counsel in viewing in mass a bulk of

MOTION DENIED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 9/19/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

vs.

HAROLD FRIEDMAN, et al,

Defendants

CASE NO. CR86-114

JUDGE GEORGE W.
WHITE

MEMORANDUM
AND ORDER

This matter is before the Court pursuant to the motion of defendant Friedman to admit into evidence certain statements made by Federal Bureau of Investigation ("hereinafter FBI"), Agent Patrick Foran and former FBI Agent, Martin McCann. Defendant Friedman contends that those statements are admissible pursuant to Rule 804(b)(5) of the Federal Rules of Evidence ("hereinafter Rule 804(b)(5)") because said declarants are unavailable to testify at trial and because these statements satisfy, *inter alia*, the trustworthiness, materiality and justice requirements of Rule 804(b)(5). The government objects to the admission of these statements into evidence, specifically arguing that the statements are neither trustworthy nor material and that the admission of such untrustworthy statements would not promote the interests of justice.

Rule 804(b)(5) allows for the admission of out-of-court statements which would otherwise be hearsay if certain requirements are met. Specifically, it must be shown that the declarant is unavailable as a witness; that the statements have circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions; that they are offered to prove a material fact; that they are more probative than other evidence obtainable through rea-

sonable efforts; that the general purposes of the rules of evidence and the interests of justice will best be served by the admission and that the proponent has given sufficient notice to the adverse party of the intent to offer said statements. F.R.E. 804(b)(5); and see e.g., *United States v. Barlow*, 693 F.2d 954, 960 and n.3 (6th Cir. 1982), cert. denied, 461 U.S. 945, 103 S.C. 2124 (1983).

As previously noted, the parties in the instant case contest the satisfaction of only three of those requirements, i.e., trustworthiness, materiality and service of evidentiary goals and justice. This Court will therefore address only these particular requirements and the unavailability requirement.

As noted, a finding of unavailability of the declarant is a prerequisite of the admission of statements pursuant to Rule 804(b)(5). For the purposes of this motion, this Court notes the stipulation between counsel for defendant Friedman and the government that declarants McCann and Foran are unavailable for trial due to the invocation by those declarants of their Fifth Amendment Rights against self-incrimination. This Court therefore finds that said declarants are unavailable as witnesses within the meaning of the Federal Rules of Evidence, Rule 804(b)(5).

Next, it must be determined whether the proffered statements possess circumstantial guarantees of trustworthiness equivalent to the other exceptions included in Rule 804. Several courts have recognized that the district courts have broad discretion in making this determination. *United States v. Curro*, 847 F.2d 325, 327 (6th Cir. 1988) (and cases cited therein). Of the several factors to be considered in determining the trustworthiness of the proffered statements are the following: whether the statement was given under oath; whether it was subsequently repeated or recanted; whether it included declarant's first-hand knowledge; whether declarant was, or believed himself to be, at risk in making the statement; whether the statement is internally consistent; whether the declarant had a motive to lie; and whether there ex-

ists evidence corroborating the statement. *United States v. Barlow*, 693 F.2d at 962; *United States v. Curro*, 847 F.2d at 327.

This Court has weighed the various factors and determines that the proffered statements bear sufficient indicia of trustworthiness to be admissible pursuant to Rule 804(b)(5). Specifically, this Court finds that the statements were ultimately signed under oath by the declarants; that these particular statements have never been recanted by the declarants; that the statements concern first-hand knowledge of the declarants; and that said declarants were subject at the time of the statements to criminal prosecution or job sanctions for making a false statement. Finally, although evidence corroborating these statements is, at best, minimal, the Sixth Circuit Court of Appeals has found the need for such to be limited where, as here, the proffered statements do not involve direct evidence of guilt. *United States v. Barlow*, 693 F.2d at 962. This Court therefore finds that these factors weight the balance in favor of a finding of trustworthiness sufficient to satisfy the requirements of Rule 804(b)(5).

As noted, the movant must also show that the statements are offered as evidence of a material fact. In this regard, defendant Friedman contends, *inter alia*, that these statements are material to his defense against the conspiracy counts in the indictment. Specifically, he argues that if co-defendants Presser and Hughes can be proven to have been government informers authorized to commit the crimes charged, then they, as government agents, cannot be said to be conspirators. As such, defendant Friedman could not be found guilty of the conspiracy counts.

This Court finds this to be a plausible, potential defense and finds that the proffered statements are relevant thereto. As such, this Court finds that the statements are sufficiently material to satisfy the requirements of Rule 804(b)(5).

Finally, this Court, having reviewed the statements in question, and considered the trustworthiness and proposed use of such statements finds that the general purposes of the evidentiary rules, as well as the interests of justice, will best be served by the admission of these statements into evidence.

All the requirements of Rule 804(b)(5) having been met, this Court orders that said statements of McCann and Foran are admissible as evidence during the instant trial.

IT IS SO ORDERED.

/s/ George W. White

George W. White
U.S. DISTRICT JUDGE

ENTERED: 10-19-88

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

HAROLD FRIEDMAN, ET AL.,

Defendants.

CASE NO. CR 86-114

**JUDGE GEORGE W.
WHITE**

**GOVERNMENT'S MOTION TO QUASH RULE 17(c)
TRIAL SUBPOENA ISSUED TO FBI DIRECTOR
WILLIAM S. SESSIONS**

The United States of America, through its undersigned attorneys, requests this Court to quash the Rule 17(c) trial subpoena for production of documents issued on behalf of defendant Friedman to FBI Director William S. Sessions (copy attached as Exhibit A). Although conceding that the FBI is the custodian of the subpoenaed documents, the government urges the Court to quash the subpoena because the standards governing such subpoenas remain unsatisfied.

INTRODUCTION

On or about May 23, 1988, defendant Friedman caused five identical pretrial subpoenas for documents to be served upon former Attorney General Edwin Meese, III, FBI Director William S. Sessions, Chief of the Organized Crime and Racketeering Section David Margolis, United States Attorney for the Northern District of Ohio Patrick M. McLaughlin and Cleveland Strike Force Acting Attorney-in-Charge Stephen H. Jigger. These subpoenas requested

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MOTION GRANTED.

IT IS SO ORDERED.

Judge /s/ George W. White

ENTERED: 10/19/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

HAROLD FRIEDMAN, *ET AL.*,

Defendants.

CASE NO. CR 86-114

JUDGE GEORGE W.

WHITE

ORDER

On motion of Honorable Patrick M. McLaughlin, United States Attorney for the Northern District of Ohio, and it appearing to the satisfaction of the Court:

1. That George Argie will be called to testify or provide other information at the trial of the case styled, *United States v. Harold Friedman, et al.*, CR 86-114 (N.D. Ohio):

2. That in the judgment of the United States Attorney, George Argie is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination;

3. That in the judgment of the United States Attorney, the testimony or other information from George Argie may be necessary to the public interest;

4. That the instant motion has been filed with the approval of an Assistant Attorney General of the United States Department of Justice pursuant to the authority vested in him by Title 18, United States Code, Section 6003(b) and Title 28, C.F.R., Section 0.175(a);

NOW, THEREFORE, IT IS ORDERED pursuant to Title 18, United States Code, Sections 6002, *et seq.*, that George Argie give testimony or provide other information which he refused to give or to provide on the basis of his privilege against self-incrimination as to all matters about which he may be questioned at the trial in the case styled, *United States v. Harold Friedman, et al.*, CR 86-114 (N.D. Ohio).

This order shall become effective only if after the making of this order George Argie refuses to testify or provide other information on the basis of his privilege against self-incrimination.

/s/ George W. White

UNITED STATES DISTRICT
COURT JUDGE

11/23/1988

ENTERED: 11/23/88

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

HAROLD FRIEDMAN, *ET AL.*,
Defendants.

CASE NO. CR 86-114

JUDGE GEORGE W.
WHITE

ORDER

On motion of Honorable Patrick M. McLaughlin, United States Attorney for the Northern District of Ohio, and it appearing to the satisfaction of the Court:

1. That Allen Friedman will be called to testify or provide other information at the trial of the case styled, *United States v. Harold Friedman, et al.*, CR 86-114 (N.D. Ohio);

2. That in the judgment of the United States Attorney, Allen Friedman is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination;

3. That in the judgment of the United States Attorney, the testimony or other information from Allen Friedman may be necessary to the public interest;

4. That the instant motion has been filed with the approval of an Assistant Attorney General of the United States Department of Justice pursuant to the authority vested in him by Title 18, United States Code, Section 6003(b) and Title 28, C.F.R., Section 0.175(a);

NOW, THEREFORE, IT IS ORDERED pursuant to Title 18, United States Code, Sections 6002, *et seq.*, that Allen Friedman give testimony or provide other information which he refused to give or to provide on the basis of his privilege against self-incrimination as to all matters about which he may be questioned at the trial in the case styled, *United States v. Harold Friedman, et al.*, CR 86-114 (N.D. Ohio).

This order shall become effective only if after the making of this order Allen Friedman refuses to testify or provide other information on the basis of his privilege against self-incrimination.

/s/ George W. White

UNITED STATES DISTRICT
COURT JUDGE

Nov. 29, 1988

ENTERED: 11-29-88

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff

vs.

HAROLD FRIEDMAN, et al.

Defendants

CASE NO. CR86-114

HON. GEORGE W.

WHITE

ORDER

This matter is before the Court pursuant to the motion of plaintiff to reconsider this Court's order of December 2, 1988 granting bond pending the appeal of witness Robert Friederick's contempt citation. Witness Friederick opposes the motion. Reconsideration is hereby granted.

This Court has reviewed the cases cited by the parties herein (the prosecution and witness Friederick) as well as the Recalcitrant Witness statute (28 U.S.C. §1826) and concludes that the appeal bond previously granted should be revoked. The Recalcitrant Witness statute allows for the granting of bond pending appeal only where the appeal is not frivolous and not taken for purposes of delay. 28 U.S.C. §1826(b). Upon reconsideration of the reasons advanced by witness Friederick for his refusal to testify even under a grant of immunity and the cases he cites in support thereof, (*Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653 (1972); *United States v. Apflebaum*, 445 U.S. 115, 100 S.Ct. 948 (1980); *United States v. Seltzer*, 621 F.Supp 714 (ND Ohio 1985), *affirmed* 794 F.2d 1114 (6th Cir. 1986), this Court finds said reasons to be frivolous and posed merely for the purposes of delay. Bond pending appeal of the contempt citation is therefore revoked.

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IT IS SO ORDERED.

/s/ George W. White

U.S. DISTRICT JUDGE

ENTERED: 12/5/88

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

v.

HAROLD FRIEDMAN, ET AL.,
Defendants.

CASE NO. CR 86-114

**JUDGE GEORGE W.
WHITE**

ORDER

On December 2, 1988, this Court ordered the prosecutors in the above-captioned case to produce copies of the Jackie Presser and Anthony Hughes informant files which the prosecutors represented were in the custody of the Federal Bureau of Investigation. The government has moved to file these documents under seal.

IT IS ORDERED that the counsel for the government forthwith produce to this Court the above-referenced informant files. These documents shall be maintained under seal until further order of this Court. The government will be afforded an opportunity to be heard prior to the unsealing of these documents, should unsealing ever be contemplated.

/s/George W. White

U.S. DISTRICT COURT JUDGE

DATE 12/5/88

ENTERED: 12-6-88

WHITE, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF PAYMENT
OF JURORS

ORDER

CASE NO. CR86-114

It appearing to the Court that the jury impaneled herein has now served a total of 30 days as of January 10, 1989,

IT IS, THEREFORE, ORDERED that as of January 10, 1989 and henceforth, the members of the jury be paid \$35.00 per day of trial attendance, pursuant to Title 28, Sec. 1871(b)(2), U.S.C.

This order is entered as of the date that all the jurors have served 30 days, the Clerk, however, will make the appropriate payment to jurors who have served 30 days prior to January 10, 1989.

/s/ George W. White

United States District Judge

ENTERED: 1/11/89

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

HAROLD FRIEDMAN

VERDICT

CASE NUMBER:

CR86-114

JUDGE GEORGE W.
WHITE

WE, THE JURY, FIND: the defendant as charged in count one
of the indictment *guilty* .

We, the jury, find the defendant as charged in count two of the
indictment *guilty* .

We, the jury, find the defendant as charged in count three of the
indictment *not guilty* .

We, the jury, find the defendant as charged in count four of the
indictment *guilty* .

We, the jury, find the defendant as charged in count five of the
indictment *not guilty* .

We, the jury, find the defendant as charged in count six of the in-
dictment *guilty* .

/s/Robert E. Kilgore
Foreperson's Signature

1/13/89

ENTERED: 1-13-89

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

*Plaintiff**vs.*

CASE NO. CR86-114

HON. GEORGE W.

WHITE

HAROLD FRIEDMAN, et al

Defendants

Since you have found the defendant HAROLD FRIEDMAN guilty as to Count I, please record which racketeering acts you found defendant HAROLD FRIEDMAN committed by checking the "Committed" column if he committed the particular act or the "Not Committed" column if he did not commit that act.

<u>Alleged Racketeering Act</u>	<u>Committed</u>	<u>Not Committed</u>
L-1	_____	_____
L-2	_____	_____
L-3	_____	_____
L-4	_____	_____
L-5	_____	_____
L-6	_____	_____
L-7	_____	_____
L-8	_____	_____
L-9	_____	_____
L-10	_____	_____
L-11	_____	_____

L-12	_____	_____
L-13	_____	_____
L-14	_____	_____
L-15	_____	_____
L-16	_____	_____
L-17	_____	_____
L-18 (same as Count III)	_____	_____
L-19	_____	_____
L-20	_____✓_____	_____
L-21	_____	_____
L-22	_____✓_____	_____
L-23	_____	_____
L-24	_____	_____
L-25	_____	_____
L-26 (same as Count IV)	_____✓_____	_____

Since you have found the defendant HAROLD FRIEDMAN guilty as to Count II, please record which racketeering acts you found that defendant HAROLD FRIEDMAN conspired to commit by checking the "Conspired to Commit" column if he conspired to commit the particular act or the "Did Not Conspire to Commit" column if he did not conspire to commit that act.

<u>Racketeering Act</u>	<u>Conspired to Commit</u>	<u>Did Not Conspire to Commit</u>
L-1	_____	_____

L-2	_____	_____
L-3	_____	_____
L-4	_____	_____
L-5	_____	_____
L-6	_____	_____
L-7	_____	_____
L-8	_____	_____
L-9	_____	_____
L-10	_____	_____
L-11	_____	_____
L-12	_____	_____
L-13	_____	_____
L-14	_____	_____
L-15	_____	_____
L-16	_____	_____
L-17	_____	_____
L-18 (same as Count III)	_____	_____
L-19	_____	_____
L-20	_____✓_____	_____
L-21	_____	_____
L-22	_____✓_____	_____
L-23	_____	_____
L-24	_____	_____
L-25	_____	_____

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L-26 (same as Count IV)

✓ _____

1-13-89

/s/Robert E. Kilgore
FOREPERSON

ENTERED: 1-13-89

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

ANTHONY HUGHES

VERDICT

CASE NUMBER:

CR86-114

WE, THE JURY, FIND: the defendant as charged in count one
of the indictment *guilty* .

We, the jury, find the defendant as charged in count two of the
indictment *guilty* .

We, the jury, find the defendant as charged in count four of the
indictment *guilty* .

/s/Robert E. Kilgore
Foreperson's Signature

1/13/89

ENTERED: 1-13-89

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

*Plaintiff**vs.*

CASE NO. CR86-114

HON. GEORGE W.

WHITE

ANTHONY HUGHES, et al

Defendants

Since you have found the defendant ANTHONY HUGHES guilty as to Count I, please record which racketeering acts you found defendant ANTHONY HUGHES committed by checking the "Committed" column if he committed the particular act or the "Not Committed" column if he did not commit that act.

<u>Alleged Racketeering Act</u>	<u>Committed</u>	<u>Not Committed</u>
L-1	_____	_____
L-2	_____	_____
L-3	_____	_____
L-4	_____	_____
L-5	_____	_____
L-6	_____	_____
L-7	_____	_____
L-8	_____	_____
L-9	_____	_____
L-10	_____	_____
L-11	_____	_____

L-12	_____	_____
L-13	_____	_____
L-14	_____	_____
L-15	_____	_____
L-16	_____	_____
L-17	_____	_____
L-18 (same as Count III)	_____	_____
L-19	_____	_____
L-20	_____	_____
L-21	_____	_____
L-22	_____✓_____	_____
L-23	_____	_____
L-24	_____	_____
L-25	_____	_____
L-26 (same as Count IV)	_____✓_____	_____

Since you have found the defendant ANTHONY HUGHES guilty as to Count II, please record which racketeering acts you found that defendant ANTHONY HUGHES conspired to commit by checking the "Conspired to Commit" column if he conspired to commit the particular act or the "Did Not Conspire to Commit" column if he did not conspire to commit that act.

<u>Racketeering Act</u>	<u>Conspired to Commit</u>	<u>Did Not Conspire to Commit</u>
L-1	_____	_____
L-2	_____	_____

L-3	_____	_____
L-4	_____	_____
L-5	_____	_____
L-6	_____	_____
L-7	_____	_____
L-8	_____	_____
L-9	_____	_____
L-10	_____	_____
L-11	_____	_____
L-12	_____	_____
L-13	_____	_____
L-14	_____	_____
L-15	_____	_____
L-16	_____	_____
L-17	_____	_____
L-18 (same as Count III)	_____	_____
L-19	_____	_____
L-20	_____	_____
L-21	_____	_____
L-22	_____✓_____	_____
L-23	_____	_____
L-24	_____	_____
L-25	_____	_____
L-26 (same as Count IV)	_____✓_____	_____

A-341

1-13-89

/s/Robert E. Kilgore
FOREPERSON

ENTERED: 1-13-89

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-VS-

CASE NO. CR 86-114

JUDGE GEORGE W.

WHITE

ANTHONY HUGHES, Et al.,

Defendants.

MOTION FOR LEAVE TO FILE REPLY BRIEF

Now comes the Defendant, Anthony Hughes, by and through the undersigned, and respectfully moves this Honorable Court for an Order granting the Defendant leave until March 30, 1989 to reply to the *Government's Response to Defendant Hughes' Motion for Acquittal or New Trial* which was served on the undersigned on Monday, March 20, 1989 for the reason that said response includes inaccurate statements of facts and law.

Respectfully Submitted,

/s/Elmer Guiliani

ELMER GUILIANI, ESQ.

526 Superior Avenue

Cleveland, Ohio 44114

(216) 241-0520

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 4/28/89

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

HAROLD FRIEDMAN, et al.,

Defendants.

CASE NO. CR86-114

JUDGE GEORGE W.

WHITE

MOTION FOR A CONTINUANCE OF THE
SENTENCING DATE

The defendant, by and through his attorney Paul J. Cambria, Jr., respectfully moves that the sentencing date be continued from May 26, 1989 to June 12, 1989.

The defendant's motion for a new trial was denied by this Court on May 5, 1989. Counsel has since met with Mr. Friedman to prepare for the sentencing phase of these proceedings.

In order to properly present the Court with a complete factual picture for purposes of sentencing, counsel would like to include expressions by the members of the various locals represented by Mr. Friedman.

Literally hundreds, if not thousands, of persons have expressed a desire to write to this Court and attest to Mr. Friedman's character and importance to them in their unions. Counsel discouraged this until the post-verdict motions were resolved so as not to tax the Court with hundreds of letters of support and commentary concerning the defendant.

Now counsel has been informed that many of these people have again expressed their desire to convey their feelings.

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MOTION DENIED.
IT IS SO ORDERED.
JUDGE /s/George W. White
ENTERED: 5/16/89

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HAROLD FRIEDMAN, et al.,

Defendants.

CASE NO. CR 86-114

JUDGE GEORGE W.

WHITE

**MOTION TO COPY AND RELEASE DEFENDANT
HAROLD FRIEDMAN'S PRE-SENTENCING
INVESTIGATIVE REPORT**

Defendant, Harold Friedman, moves this Honorable Court for an Order allowing him, by and through his attorneys, to copy and remove the pre-sentencing investigative report compiled by the United States Probation Department located at 668 Euclid Avenue, Suite 606, Cleveland, Ohio 44114. The information contained in the pre-sentencing investigative report is vital to the preparation of the sentencing hearing

MOTION DENIED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 5/22/89

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA

vs.

**JUDGMENT IN A
CRIMINAL CASE**

HAROLD FRIEDMAN

31100 Cedar Road

Pepper Pike, Ohio 444124

Case Number:

CR86-114

(Name and Address of Defendant)

Paul Cambria

Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[☐ guilty ☐ nolo contendere] as to count(s) _____

☐ not guilty as to count(s) _____

THERE WAS A:

[☐ finding ☒ verdict] of guilty as to count(s) 1, 2, 4 & 6

THERE WAS A:

[☐ finding ☒ verdict] of not guilty as to count(s) 3 & 5

☐ judgment of acquittal as to count(s) _____

**The defendant is acquitted and discharged as to this/these
count(s).**

**THE DEFENDANT IS CONVICTED OF THE OFFENSE(S)
OF: 18 U.S.C. 1962(c)(d) — RICO Conspiracy (Counts 1 & 2). 29
U.S.C. 501(c) — Union Embezzlement (Count 4). 29 U.S.C.
439(b) — False Statement to Department of Labor (Count 6).**

**IT IS THE JUDGMENT OF THIS COURT THAT: The imposi-
tion of sentence is hereby suspended and the defendant is placed
on probation for a period of four (4) years. The defendant shall
forfeit the following union positions as stipulated: (1) president of
Local 507 of the International Brotherhood of Teamsters, Chauf-**

feurs, Warehouseman, and Helpers of America (2) president of Local 19 of the Bakery, Confectionery and Tobacco Workers International Union (3) trustee, Local 507 Health & Welfare Fund (4) trustee, Local 507 Pension Fund (5) trustee, Local 19 Health & Welfare Fund (6) trustee, Local 19 Pension Fund (7) trustee, Local 19, Charitable, Educational and Recreation Fund (8) credits accrued by him during the period 1-1-78 through 12-31-81 in the Local 507 Pension Fund, and (9) credits accrued by him during the period 1-1-78 through 12-31-81 in the Local 19 Pension Fund. It is further ordered that the defendant pay fines of \$10,000 on Count 1, \$10,000 on Count 2, \$5,000 on Count 4 and \$10,000 on Count 6 as directed by the Probation Dept. It is further ordered that the sentence is stayed pending the outcome of appeal. It is further ordered that the defendant remain on same bond.

In addition to any conditions of probation imposed above, **IT IS ORDERED** that the conditions of probation set out on the reverse of this judgment are imposed.

ENTERED: 5-30-89

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A
CRIMINAL CASE

vs.

ANTHONY HUGHES

Case Number:
CR86-114

(Name and Address of Defendant)

Elmer Guiliani

Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[☐ guilty ☐ nolo contendere] as to count(s) _____

☐ not guilty as to count(s) _____

THERE WAS A:

[☐ finding ☒ verdict] of guilty as to count(s) 1, 2 & 4

(only counts against defendant)

THERE WAS A:

[☐ finding ☐ verdict] of not guilty as to count(s) _____

☐ judgment of acquittal as to count(s) _____

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S)
OF: 18 U.S.C. 1962(c)(d) — RICO Conspiracy (Counts 1 & 2). 29
U.S.C. 501(c) & 18 U.S.C. 2 — Union Embezzlement and Aiding
& Abetting (Count 4).

IT IS THE JUDGMENT OF THIS COURT THAT: The im-
position of sentence is hereby suspended and the defendant is placed
on probation for a period of four (4) years. The defendant shall
forfeit the following union positions as stipulated: (1) recording
secretary of Local 507 (2) business agent of Local 19 (3) \$43,500
paid to him by Local 19 from 1-1-78 through 12-31-78 and from 5-

16-81 through 12-31-81 (4) credits accrued by him during the periods 1-1-78 through 12-31-78 and 5-16-81 through 12-31-81 in the Local 507 Pension Fund and (5) credits accrued by him during the periods 1-1-78 through 12-31-78 and 5-16-81 through 12-31-81 in the Local 19 Pension Fund. It is further ordered that the defendant pay fines of \$10,000 on Count 1, \$10,000 on Count 2 and \$10,000 on Count 4 as directed by the Probation Dept. It is further ordered that the sentence is stayed pending the outcome of appeal. It is further ordered that the defendant remain on same bond.

In addition to any conditions of probation imposed above, **IT IS ORDERED** that the conditions of probation set out on the reverse of this judgment are imposed.

ENTERED: 5-30-89

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACKIE PRESSER, ET AL.,

Defendants.

CASE NO. CR 86-114

JUDGE GEORGE W.

WHITE

MOTION FOR
EXTENSION OF
TIME

Now come Applicants National Broadcasting Company, Inc. and its wholly-owned subsidiary, WKYC-TV3 (collectively, "Applicants"), and respectfully move this Court for an extension of ten (10) days to and including August 28, 1989, in which to file its reply to the Government's Response to Applicants' Application for Access to Sealed Information. The Government's Response was filed on July 31, 1989, but briefing responsibilities in *Martin, et al. v. Ohio Turnpike Commission*, Case No. C87-1548, pending before Judge Aldrich and two Sixth Circuit briefs in *Farber v. Massillon Board of Education*, Case Nos. 87-4035 and 89-3456 have prevented the undersigned counsel from completing Applicants' reply.

MOTION GRANTED.

IT IS SO ORDERED.

JUDGE /s/George W. White

ENTERED: 8/23/89

18 U.S.C. §1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from un-

ion funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. §1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of secu-

rities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections¹ (a), (b), or (c) of this section.

29 U.S.C. §501. Fiduciary responsibility of officers of labor organizations

(a) Duties of officers; exculpatory provisions and resolutions void

¹ So in original. Probably should be "subsection".

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organizations. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

- (b) Violation of duties; action by member after refusal or failure by labor organization to commence proceedings; jurisdiction; leave of court, counsel fees and expenses

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover

damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Embezzlement of assets; penalty

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

